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IN THE
Supreme Court of the United States
OFFICE OF THE CLERK

OCTOBER TERM, 1998

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,*Petitioner,*

—v.—

RAY AGARD,

*Respondent.*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD A. BROWN
District Attorney, Queens CountyJOHN CASTELLANO*
ELLEN C. ABBOT
Assistant District AttorneysQueens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5801* *Counsel of Record for the Petitioner*

January 20, 1999

1098

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in extending this Court's decision in Griffin v. California, 380 U.S. 609 (1965) -- which prohibited a prosecutor's comment on a defendant's right to remain silent -- to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses?

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LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

v.

RAY AGARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner Leonard Portuondo, Superintendent of the Fishkill Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 23, 1998, directing the district court to grant the petition for a writ of habeas corpus unless the state affords defendant a retrial within sixty days from the date of the mandate. The petitioner is represented in this proceeding

by the District Attorney of Queens County, New York, by agreement with the Attorney General of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 117 F.3d 696 (Oakes, J; Winter, J., concurring; Van Graafeiland, J., dissenting), and is reprinted in the appendix to this petition at p. 70a, *infra*. The order of the Court of Appeals for the Second Circuit denying rehearing or rehearing en banc is reprinted in the appendix at p. 79a, *infra*.

The memorandum decision of the United States District Court for the Southern District of New York (Raggi, J.) has not been reported. It was delivered orally by the court and transcribed in minutes dated March 15, 1996. The opinion, as transcribed, is reprinted in the appendix at p. 1a, *infra*, and the order and judgment of the court are reprinted at pp. 10a and 79a, respectively.

JURISDICTION

This petition for a writ of habeas corpus was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On March 15, 1996, the Eastern District denied the petition for a writ of habeas corpus. Pet. App. at 1a, 10a, 79a.

On July 3, 1997, the Second Circuit entered a judgment and an opinion reversing that decision and remanding the case to the district court, with directions to grant the petition. Pet. App. at 12a.

On October 23, 1998, the Court of Appeals for the Second Circuit denied that petition for rehearing and petition for rehearing en banc. Pet. App. at 70a.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Second Circuit Court of Appeals held that the prosecutor's remark was prohibited by both the Fifth and Sixth Amendments.

The Fifth and Sixth Amendment to the Constitution of the United States provide respectively, in pertinent part:

**Amendment V - Grand Jury Indictment
for Capital Crimes; Double Jeopardy;
Self-incrimination; Due Process of Law;
Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VI - Jury Trial for Crimes,
and Procedural Rights**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and casue of the accusation; to be confronted with the witnesses against him; to have compulstory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

At trial, Nessa Winder described her first meeting with defendant at a nightclub, which culminated in a consensual sexual encounter. During the week that followed, defendant and Winder agreed to meet again at the nightclub. Winder and a friend went to the club and met defendant. The last thing that Winder recalled that evening was defendant's friend arriving at the club, and she could remember nothing else between that time and when she awoke in defendant's apartment the following morning.¹

When Winder awoke the next morning, she was wearing only a vest, and defendant was lying next to her wearing only his underwear. After Winder refused defendant's request for sex, defendant hit and kicked her. He then forced her to commit sodomy, and other sex acts. Winder eventually escaped, contacted the police, and received medical treatment for her injuries.

The following day, defendant left a telephone message for Winder on her answering machine and apologized for being a "golden asshole" and for the "entire situation." He wished that Winder would "live safely [sic] and peacefully." As a result of a search warrant executed at defendant's home, the police recovered a .45 caliber automatic handgun, holster, and two magazines containing shells. Defendant was arrested, and eventually admitted that he had a gun, but claimed that he was

1. Both women returned to defendant's apartment, where he threatened Winder's friend with a gun.

holding it for a friend. He also acknowledged that he had been involved in a fight with Winder and that, during that fight, she scratched him and he "mushed" her face. He admitted that they had had sex, but claimed it was consensual.

Among the witnesses called for the defense, defendant testified on his own behalf. He stated that he and Winder had met the week prior to the sexual encounter at issue, that the two had engaged in consensual vaginal intercourse, oral sodomy, and anal intercourse. Defendant admitted that on the morning in question, May 6, 1990, he engaged in vaginal intercourse and oral sex with Winder, but denied that they had engaged in any anal intercourse. Defendant stated that it was entirely consensual. He also admitted that he called Winder the next day to apologize, but claimed that he was only apologizing for "mush[ing]" her face.

Defense counsel, in his summation, argued vigorously that the prosecution's witnesses had fabricated the allegations against defendant, and that defendant's testimony was more credible than the testimony of the prosecution's witnesses. He asked the jury to compare the victim's testimony with defendant's testimony, and to "consider the reasonableness of the two different stories." Defense counsel also argued that defendant's description of the events on the day of the crime, was a "more reasonable and natural extension of the relationship that started the weekend before," and described defendant's testimony as "consistent."

In response, the prosecutor argued that Winder had been victimized by defendant even though defendant wanted the jury to think that he was the victim. She asked the jury to consider that defendant, rather than the victim, was the person who had been less than straightforward because he was an interested

witness. Further, the prosecutor pointed to the fact that defendant had had the opportunity to hear all of the testimony in the case before he testified. She stated that "unlike all the other witnesses . . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony all the other witnesses before he testifies." The prosecutor continued, "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say [sic]? How am I going to fit it into the evidence?" She concluded that defendant was a "smart man. I never said that he was stupid. . . . He used everything to his advantage."

State Court Proceedings

On direct appeal to the Supreme Court of the State of New York, Appellate Division, defendant argued, among other things, that his right to a fair trial was abridged due to the prosecutor's summation comment regarding defendant's advantage in hearing other witnesses before he testified.

On December 20, 1993, the Appellate Division modified the judgment of conviction by reversing one conviction of third-degree weapon possession and dismissing that count of the indictment, and, as modified, unanimously affirmed the judgment. *People v. Agard*, 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993).

On February 1, 1994, defendant sought leave to appeal to the New York Court of Appeals. In his leave application, defendant argued the same claims that he had raised in the Appellate Division. On April 14, 1994, defendant's application for leave to appeal to the New York Court of Appeals was

denied. People v. Agard, 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994).

Federal Court Proceedings

In his June, 1995, petition for a writ of habeas corpus, among defendant's claims, he argued that the prosecutor, in her summation, improperly infringed his right to be present at trial and to confront his accusers by noting that he had had the opportunity to hear all of the testimony before he testified in his own behalf.

In a decision dated March 15, 1996, the District Court denied the petition (Raggi, U.S.D.J.). As a preliminary matter, the court noted that this case had presented a question of credibility for the jury and that "there is no question in my mind that this court could not hope on a cold record, to make credibility determinations between [the defendant and the complainant]. That is not my task in any event" (Decision: 15; Pet. App. at 2a). It later continued,

when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a wholesale verdict; it wrestled with this.

(Decision: 15) Pet. App. at 2a-3a. The Court then ruled on defendant's claims. Among its specific findings, the District Court rejected defendant's claim that the prosecutor's summation infringed on defendant's right to be present and confront his accusers under the Sixth and Fourteenth

Amendments. Whether or not the statement was erroneous, the Court ruled that "I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from [the prosecutor's] remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind . . . that there was any prejudice here or that I have any concern that this may have swayed the verdict" (Decision: 22) Pet. App. at 9a.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ unless the state afforded defendant a new trial within sixty days from the date of the mandate. Among its findings, the Court of Appeals held that the prosecutor's summation remark violated defendant's Fifth and Sixth Amendment rights, and also constituted harmful error. See Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997); Pet. App. at 12a.

The court ruled that the prosecutor's summation remark, that insinuated to the jury for the first time on summation that a defendant's presence in the courtroom gave him a unique opportunity to tailor his testimony to match the evidence, violated a criminal defendant's constitutional rights to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.

Upon denying the petition for rehearing Agard v. Portuondo, 159 F.3d 98 (2d Cir. 1998) (Pet. App. at 70a), the court narrowed the rationale of its earlier ruling. The court stated that it retreated from any language in the prior decision that suggested that it was constitutional error for a prosecutor to elicit facts tending to show that a defendant tailored his testimony, or to comment on that factual showing. But the

court also ruled that a prosecutor could not comment on defendant's presence in the courtroom, or the concomitant opportunity to hear the testimony of other witnesses without such additional factual showing demonstrates that defendant tailored his testimony. Because the prosecutor in this case ran afoul of this prohibition on commenting on defendant's presence and opportunity to hear other witnesses, the court adhered to its prior reversal of the district court decision.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Second Circuit's decision prohibiting comment on a defendant's presence in the courtroom warrants review for several reasons. First, the decision creates an unwarranted extension of this Court's decision in Griffin v. California, 380 U.S. 609 (1965), thereby creating a rule that this Court has never considered and one that was never remotely contemplated by the Griffin Court. In Griffin, the Court ruled that a prosecutor's comment on a defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. But Griffin only addressed the propriety of comments on the right to remain silent; it did not stand for the proposition that any comment concerning the exercise of any constitutional right was a constitutional error. Furthermore, this Court has held that Griffin should be interpreted narrowly, an admonition that the Second Circuit entirely failed to heed. Because the Second Circuit's prohibition was contrary to this Court's decisions, and because it presents an issue never before considered by this Court, it is worthy of this Court's review.

Second, the issue in this case has for some time generated a split of authority among the courts that requires this Court's intervention. Courts nationwide have been at odds for many years over whether and when a prosecutor may appropriately comment on a defendant's presence or behavior in the courtroom. This case presents the Court with the opportunity to resolve this dispute.

Third, the Second Circuit's ruling could potentially affect any criminal trial in any jurisdiction in which a defendant testifies. These far-reaching effects demonstrate the need to review an issue of such national importance. Indeed, because of the importance of the case, the Second Circuit's ruling in this very case has already generated a substantial, national controversy. It has engendered a plethora of articles and decisions that directly debate the validity and significance of the Second Circuit's finding of constitutional error.

I. The Second Circuit Improperly Extended Griffin v. California, 380 U.S. 609 (1965), To Prohibit Comment on a Defendant's Presence in the Courtroom, Despite this Court's Admonitions That Griffin Should be Interpreted Narrowly and In Accordance with Its Facts.

The Agard court's conclusion that the Fifth and Sixth Amendment prohibited a prosecutor's remark on the defendant's presence in the courtroom was an unwarranted extension of Griffin v. California, 380 U.S. 609 (1965). The Griffin decision prohibited a prosecutor from commenting on a defendant's failure to testify, but the Second Circuit applied it to an entirely different constitutional right, apparently on the theory that a prosecutor's comment on any constitutional right is in itself constitutional error, at least without some specific factual

showing that could independently establish that testimony had been falsified. This extension was never contemplated by the Griffin Court nor is it supported by the reasoning of Griffin.

Griffin's ruling was limited to a defendant's Fifth Amendment right to remain silent. In Griffin, the Court considered whether a prosecutor's comment on a defendant's failure to testify, and a court's charge that the jury could draw a negative inference from a defendant's failure to testify, violated his Fifth Amendment rights. The prosecutor in Griffin reviewed the facts supporting the murder, and then rhetorically asked what kind of man would commit those acts. The prosecutor continued that the defendant would know that, but that he had "not seen fit to take the stand and deny or explain . . . and in the whole world, if anybody would know, this defendant would know." Griffin, 380 U.S. at 611. The prosecutor then concluded that because the victim was dead, she could not tell the jury her side of the story and that "[t]he defendant won't." Id.

In Agard, the Court used Griffin "by analogy" to find that a prosecutor's comment on the presence of a defendant in the courtroom and the defendant's opportunity to hear other witnesses, was improper. But Griffin only "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Indeed, even the Second Circuit acknowledged that Griffin did not explicitly prohibit the prosecutor's remarks. For example, in its initial decision and the petition for rehearing, the Second Circuit relied on Griffin by holding that the prosecutor's remarks were "analogous" to those prohibited in Griffin (Agard, 117 F.3d at 709, Pet. App. at 42a), and, in its second decision, stated only that the issue was "somewhat similar to that in Griffin" (Agard,

159 F.3d at 99, Pet. App. at 73a). Thus, the Agard panel's determination used Griffin to create a rule that this case never contemplated.

More importantly, as at least one commentator has noted, the Second Circuit's decision in Agard is contrary to the rationale supporting Griffin. "A significant danger of permitting comment on the exercise of the self-incrimination is that the jury will draw improper inferences; there is a great risk that they will believe the accused has not testified because he is guilty, rather than because of any of the other reasons he might choose to remain silent." Michael Martin, The Tailoring of Testimony, N.Y.L.J., October 10, 1997, at p. 3. By contrast, it is unlikely that a jury would infer a defendant's guilt merely through his attendance at trial. "While a juror in a Griffin situation might think that 'he would have testified if he didn't have something to hide,' it seems unlikely that a juror . . . would say to herself, if he were innocent, he wouldn't have attended the trial before testifying." Id. Thus, the reasoning of Griffin simply does not support the finding of error here.

Moreover, using Griffin to find a constitutional violation by analogy is contrary to subsequent decisions that encourage a narrow rather than a broad application of the Griffin holding. In United States v. Robinson, 485 U.S. 25 (1988), the Court rejected the circuit court's ruling that "any 'direct' reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in Griffin." Robinson, 485 U.S. at 31. The Court then declined to give Griffin a "broad reading," later noted that the "broad dicta in Griffin to the effect that the Fifth Amendment 'prohibited a comment on an accused's right to silence must be viewed in light of the facts of the case, and found that a prosecutor can remark on a defendant's failure to testify if it represents a fair response." Id. at 31, 33.

Likewise, in United States v. Francis, 82 F.3d 77, 79 (4th Cir.), cert. denied, 116 S.Ct. 2513 (1996), the court refused to extend the holding of Griffin to a comment that the evidence was uncontradicted because to do so would "run afoul of the Supreme Court's admonition in Robinson against 'giving Griffin a broad reading.'" Therefore, the expansive application of Griffin to the remarks here are contrary to the narrow reading previously mandated in Robinson.

In sum, the Second Circuit's expansive application of Griffin to the remarks here was unwarranted because it applied Griffin in a manner never contemplated by this Court. Application of Griffin in this way -- particularly in light of this Court's decisions that Griffin should be applied narrowly -- supports a finding that this case is worthy of review.

II. There is a Split of Authority on the Propriety of A Prosecutor's Comments on a Defendant's Presence and Demeanor in the Courtroom, and this Case Presents the Court with an Opportunity to Provide Guidance to Lower State and Federal Courts on that Issue.

The issue presented by this case has for some time generated a split of authority that this Court now has the opportunity to resolve. Even the Second Circuit in this case noted a split of authority in state courts regarding the propriety of remarks commenting on the defendant's credibility based on his presence at trial. Agard, 117 F.3d at 707-708, Pet. App. at 38a-39a. And federal courts have long been split on the question of the propriety of comments on a defendant's demeanor or presence in the courtroom. Because this case

presents an unsettled issue of law, it is worthy of this Court's review.

As the Second Circuit noted (id.; Pet. App. at 38a-39a), the highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that prosecutorial commentary on a defendant's presence during the testimony of other witnesses is improper. State v. Cassidy, 672 A.2d 899, 905-08 (Ct. 1996); State v. Jones, 580 A.2d 161, 162-63 (Me. 1990) (prosecutor's comment was improper but defendant failed to preserve issue for appeal); Coreas v. United States, 565 A.2d 594, 604 (D.C. Ct. App. 1989); State v. Hemingway, 528 A.2d 746, 747-78 (Vt. 1987); Commonwealth v. Person, 508 N.E.2d 88, 90-91 (Mass. 1987); Dyson v. United States, 418 A.2d 127, 131 (D.C. Ct. App. 1980); State v. Johnson, 908 P.2d 900, 902-03 (Ct. App. Wa. 1996).

But the Second Circuit also acknowledged that the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas, which addressed remarks identical to those here, did not find error. See People v. Buckey, 378 N.W.2d 432, 436-39 (Mic. 1985); State v. Grilli, 369 N.W.2d 35, 37 (Minn. Ct. App. 1985); State v. Robinson, 384 A.2d 569, 569-70 (N.J. Super. Ct. App. Div. 1978).

Nor does the controversy end there. The comment made by the prosecutor in Agard implicates both the specific issue concerning a defendant's presence in the courtroom and a larger disagreement over the propriety of a prosecutor's comment on a defendant's demeanor or conduct while present in the courtroom. See Agard, 117 F.3d at 718, Pet. App. at 59a-60a (Van Graafeiland, dissenting). This latter issue too has generated a deep split of authority. The First Circuit, for

example, did not find an issue worthy of federal habeas corpus review when evaluating a prosecutor's remark that the defendant remained expressionless and unremorseful in the courtroom. Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979). Likewise, the Fifth and Sixth Circuits have held that a prosecutor's comment on a defendant's expressionless courtroom demeanor did not raise an issue for federal habeas corpus review. Cunningham v. Perini, 655 F.2d 98, 101 (6th Cir. 1981), cert. denied, 455 U.S. 924 (1982); Bishop v. Wainwright, 511 F.2d 664, 667 (5th Cir. 1975), cert. denied, 425 U.S. 980 (1976); see also Six v. Delo, 94 F.3d 469, 476 (8th Cir. 1996) (because prosecutor's comment that asked if defendant had shown remorse was prefaced with a reference to the fact that the jury had watched defendant during the penalty phase of trial, the comment was only intended as a remark on defendant's general demeanor and the jury would not have naturally taken the comment as referring to defendant's failure to testify), cert. denied __ U.S. __, 117 S.Ct. 2418 (1997); United States v. Warren, 973 F.2d 1304, 1307 (6th Cir. 1992) (prosecutor's remark that defendant waited to hear the prosecution witnesses before coming up with his version of the truth was fair comment on the reservation of his opening statement and his allegedly concocted testimony).

Other cases, in disapproving comments on a defendant's courtroom demeanor, have noted the split among the circuits under similar factual scenarios. See United States v. Gatto, 995 F.2d 449 (3d Cir.) (disapproving of comments on defendant's intimidating looks but noting that cases from other circuits seem to advance differing rationales), cert. denied, __ U.S. __, 114 S.Ct. 391 (1993); United States v. Schuler, 813 F.2d 978 (9th Cir. 1987) (noting that the First and Fifth Circuits have ruled that remarks about the expressionless courtroom demeanor of

a defendant did not necessarily allude to the failure to testify).²

Moreover, to the extent that the Second Circuit's decision implies that a comment on a defendant's exercise of any constitutional right is error without some additional showing, this issue too has divided the circuits.

For example, the extent to which a prosecutor can comment on a defendant's Sixth Amendment right to counsel has been the subject of debate among lower courts. For example, in United States v. McDonald, 620 F.2d 558 (5th Cir. 1980), the prosecutor's comment on the presence of the defendant's lawyer when a search warrant was executed at the defendant's house, which raised the inference of defendant's guilt was ruled to be error; it was an impermissible attempt to prove a defendant's guilt because the defendant sought the assistance of counsel.³

2. The prosecutor's comment, which focussed on defendant's credibility, is consistent with the general precept that the credibility of a defendant who testifies may be assailed like that of any other witness. See generally Brown v. United States, 356 U.S. 148 (1957). In fact, courts often give special instructions that instruct a jury on the interest of a defendant when evaluating his testimony. See, e.g., United States v. Mathias, 836 F.2d 744, 749 (2d Cir. 1988). The prosecutor's comment on the defendant's unique opportunity to present his testimony because he was present throughout the trial is compatible with these principles.

3. But later decisions distinguished McDonald, in part, based on whether the jury was aware that the defendant was represented by counsel. For example, in Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), the court ruled that the prosecutor's comment that the defendant's first reaction when he learned that he might be a suspect was to contact a lawyer, rather than to assist the police in their investigation, did not affect the fairness of a capital sentencing proceeding. The court noted that the jury was already aware that the defendant had sought counsel based on the defendant's own testimony. The Harich court also discussed United States v. Mack, 643 F.2d 1119, 1124 (5th Cir. 1987), in which the prosecutor's reference to the seven defense lawyers who represented defendant at trial was ruled to be harmless because the jury was already aware that defendant was represented by those lawyers.

By contrast, other decisions have noted that when the prosecution reveals that a defendant asked for a lawyer after his arrest, courts have looked at all the circumstances in order to determine how seriously the jury "may have penalized defendant's exercise of his right to counsel." United States v. Daoud, 741 F.2d 478 (1st Cir. 1984). Indeed, the First Circuit stated that "incidental references" to this right need not lead to reversal, and then reviewed decisions of the Fifth and Seventh Circuits that did not require reversal. *Id.* Thus, these decisions also demonstrate the unsettled nature of the propriety of a prosecutor's reference to a defendant's exercise of a constitutional right. Thus, this case presents this Court with the opportunity to define the analysis to be employed in ruling on the validity of comment regarding a defendant's exercise of his constitutional rights.

In sum, this case is worthy of review because it presents this Court with an opportunity to adopt a standard for determining the propriety of prosecutorial comment on a defendant's exercise of his constitutional rights. More particularly, it allows the court to settle a long-standing dispute over whether it is permissible to comment on the exercise of a defendant's right to be present at trial.

III. This Case is Worthy of Review Because of its Potential Effect on Criminal Trials Nationwide, As Demonstrated by the Extensive Controversy That the Second Circuit's Ruling Has Engendered.

The Agard ruling is also worthy of review because they present an issue of national importance that potentially affect every criminal trial. The ruling has generated considerable controversy, thus indicating an issue that is not only unsettled

but is also of considerable concern to criminal practitioners, judges, and commentators everywhere.

Each of the issues raised by the Agard decision potentially effects criminal trials nationwide. The propriety of a comment on the defendant's presence in the courtroom, to establish that a testifying defendant has an advantage over other witnesses, is an issue that can arise in any case in which a defendant takes the stand. And the propriety of a comment on a defendant's demeanor in the courtroom or the exercise of any other constitutional right may indeed affect any criminal trial. Moreover, the importance of the Agard decision to practitioners is demonstrated by the considerable commentary that the Second Circuit has engendered by its ruling.

The Second Circuit's initial decision has been extensively discussed across the nation. For example, the decision has already been the subject of published commentary on several occasions in the New York Law Journal. *See, e.g.,* Deborah Pines, Circuit's Revised Opinion Reaffirms Grant of Habeas, N.Y.L.J., October 30, 1998, at p. 1; Michael Martin, The Tailoring of Testimony, N.Y.L.J., October 10, 1997, at p. 3; Letters to the Editor, N.Y.L.J., November 7, 1997, at p. 2. Michael Martin's article was critical of the initial Agard decision, and the letter to the editor in response questioned the article's discussion of the court's reasoning in Agard. Thus, it is apparent that the rationale of Agard has generated extensive debate.

Moreover, the initial Agard decision was cited by courts as diverse as the state courts of Connecticut, Massachusetts, Minnesota, and Missouri, and the United States Navy-Marine Corps Court of Criminal Appeals. *See, e.g., United States v. Carpenter*, 1998 LEXIS 259 (C.C.A. June 30, 1998); Commonwealth v. Jones, 697 N.E.2d 140 (Mass. App. Ct.

1998); Missouri v. Walker, 972 S.W.2d 623 (Mo. Ct. App. 1998); Connecticut v. Shinn, 704 A.2d 816 (Conn. App. Ct. 1997). Finally, the initial Agard decision was discussed in a number of law journal commentaries. See, e.g., Faust F. Rossi, Evidence, 48 Syracuse L. Rev. 659 (1998).

Thus, the controversy over the Second Circuit's rulings in Agard demonstrates the far-reaching national implications of the issue. This controversy supports granting certiorari in order to instruct lower state and federal courts regarding the validity and the application of the rule advanced in Agard.

Respectfully submitted,

RICHARD A. BROWN
District Attorney, Queens County

JOHN CASTELLANO*
ELLEN C. ABBOT
Assistant District Attorneys

Queens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5846

*Counsel of Record for the Petitioner

January 18, 1999

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AGARD,

Plaintiff,

- v -

PORTUNDO,

Defendant.

X

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X

No.: CV-95-2239 (RR)

TRANSCRIPT OF CIVIL CAUSE FOR STATUS
CONFERENCE/HEARING BEFORE THE
HONORABLE REENA RAGGI
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

BEVERLY VAN NESS, ESQ.
377 Broadway, Ninth Floor
New York, New York
(212) 274-0402

For the Defendant:

BY: BRUCE SEELIGER
Assistant District Attorney
Queens County District
Attorney's Office

Audio Operator:

LISA AUSON

COURT TRANSCRIBER:

Diana Timmons
P.D. TRANSCRIPTIONS
1115 Willow Avenue
Hoboken, New Jersey 07030

Proceedings recorded by electronic sound recording, transcript

produced by transcription service.

THE COURT: I thought a number of interesting issues were raised by the petitioner in this case and needed careful attention by the court, which is one of the reasons that I have given this quite a bit of thought, and also read the transcript with some care.

Everyone is right. This was a credibility decision for the jury. And I read very carefully the testimony of both the defendant and the victim and there is no question in my mind that this court could not hope, on a cold record, to make credibility determinations between the people. That would not be my task in any event. But in some cases it's easier to get a sense for where the credibility problems were or were not. This is a much more difficult case.

And so for that reason I have looked carefully at the three issues that have been raised by the petitioner.

I also recognize that the jury did acquit on a number of counts and that it is really only on this issue relating to the anal intercourse that a guilty verdict was returned and I think it is appropriate to look at this carefully. But I will say, parenthetically, that while it is not relevant to my consideration of constitutional deprivations, when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a wholesale

verdict; it wrestled with this. That is why there were four days of deliberation.

But my task is to decide whether or not the conviction in this case was obtained in violation of federal constitutional or statutory law.

The first issue is whether the defendant was denied his constitutional right to confront witnesses and to proffer evidence because of the trial court's preclusion of defense experts' testimony.

Now, the questions were posed of various ways but, as I said the precluded testimony basically involved eliciting from the defense expert his opinion as to the likelihood of a finding of rectal trauma to a victim of forcible anal intercourse. This was relevant because the undisputed medical testimony is that the victim in this case did not have any evidence of rectal trauma.

Now, the state court in considering this found that it was error for the trial court not to allow this examination to be conducted of the expert. And while plaintiff's counsel has suggested that I'm not bound by that, as an evidentiary ruling of the state on state law, I think that that is a binding holding. There was at least an error of state law committed. Now the question is whether that rises to a constitutional deprivation.

In this case I am not convinced that habeas relief is warranted. And I will state my reasons, though I recognize the plaintiff's counsel disagrees with this : a reading of the

entire trial transcript, with all the expert testimony, satisfies me that the plaintiff's expert was asked whether or not there would likely be vaginal as well as anal trauma, if there were a rape and anal intercourse. And he indicated that that was not always the case. But the defense expert did say that this kind of trauma is often seen to the anal area, even with consensual anal sex. And that suggests to me that the defendant had ample opportunity to argue to the jury that the victim should not be credited here, because she had no evidence of rectal trauma.

Now, there was a lot of discussion back and forth at the trial court level of what defense counsel meant by forcible and intercourse. I am not concerned with that because, as I said, the state court found that he should have been allowed to ask the question. But I do note that there is an element of that issue, whether we're talking about non-consensual or whether we're talking about the excessive use of physical force. In any event the jury heard that even without any use of force, with consent, with lubrication, there is often rectal trauma. And under these circumstances I think the important point is that the defendant had his argument as to why the victim should not be believed, given that she had no evidence of this.

Now, that is not the only point on which this victim could be impeached. And so to some extent I have to consider whether what happened here was the deprivation of meaningful ability to develop evidence that impeached this witness.

There is no much other evidence that the defense was able to take advantage of to argue to the jury that the witness should not be believed that I cannot say that the small addition of a specific statement by the expert that he, in his experience, had always seen rectal trauma when there was forcible anal intercourse would have added much to this case.

As I said, ultimately, the argument was that she didn't get into a struggle with him over this. And so that is where the issue of forcible activity would have been an issue. It wasn't consensual, but she did not allege that she had been involved in some kind of violent struggle over this.

I don't think, upon reviewing the entire transcript that I can say that this defendant was convicted in violation of his constitutional right to put forward evidence that would have had a significant or even more relevant way of cross-examining or impeaching, I should say, the victim, than was already on the record with the testimony of the experts.

Now, there was limitation on the victim's cross-examination regarding her prior experience in anal intercourse. I recognize that her volunteered statement that she was not really into anal intercourse is not the same thing as her saying: no, never, I never had this experience before. I recognize the argument is that if she had said, no, that the defendant would have then sought to argue that, well, if she had never had this experience one would have more likely expected trauma.

But certainly the people did not try to suggest that she had this experience and that that was why she didn't have the trauma. And so I think that this decision, which is within the discretion of the state trial judge, really involves a state law question of the exercise of discretion and did not involve a denial of the right to impeach sufficient to rise to a constitutional deprivation.

Finally, I have the prosecutorial comments in summation. The prosecutor remarked that the defendant basically had the benefit, as he said, and a benefit unlike all other witnesses of getting to sit and listen to the testimony of other witnesses before he testifies. The prosecutor continued, "That gives you a big advantage, doesn't it? You get to sit down here and think, what I am going to say and how and how am I going to say it? How am I going to fit it into the evidence?"

Now, the suggestion is that this infringed the petitioner's constitutional right to be present at trial and to confront his accusers under the Sixth and Fourteenth Amendments.

I think it's important to understand what this argument is. Of course, the defendant was present at trial and, of course, his counsel did have the opportunity to cross-examine witnesses. The real issue is whether this summation comment somehow suggested to the jury that his presence at trial should be used against him.

Now, while I haven't found much federal law on this point, I have noticed that state courts

split somewhat in their evaluation of this kind of comment. I have found cases by the supreme court of New Mexico, State versus Hoxsie; the Missouri court of appeals, State versus Moomey; a superior court in New Jersey, State versus Robinson; the supreme court of South Dakota, State versus Howard; the court of appeal of Texas, Reed versus State; and supreme court of Michigan, People versus Buckley - all of which seem to hold that there is not any constitutional violation, not any deprivation of the right to be present or the right to confront and cross-examine witnesses in comments such as these.

On the other hand, in Commonwealth versus Elberry (Ph.) by the appeals court of Massachusetts, in State versus Johnson by Division One of the court of appeals of Washington, State versus Hemingway by the supreme court of Vermont, and Jenkins versus the United States by the District of Columbia court of appeals, the suggestion is that such comment is improper.

Having looked at the rationales by these courts, it seems to me that what has to be of concern is whether the comment can be viewed as a fair attempt to talk about the credibility of the defendant and any opportunity he may have had to fabricate - something that is always relevant to a jury's evaluation of any witness's credibility - or whether there is an unfair attempt to suggest that defendant should not be believed because he exercised a constitutional right, namely, the right to be present at trial.

I have to caution the prosecution that I am troubled by the formulation here. This was not a summation that said: Ladies and gentlemen, I want you to be clear that the people recognize the defendant's absolute right to be present at this trial; he has a right to be present and we're not suggesting otherwise.

This was not a summation that then continued to say: But in evaluating his credibility you are entitled to consider what opportunities he may have to tailor his testimony and in that regard you know he heard the testimony of the other witnesses before he testified.

It wasn't an argument focused like that, simply on the opportunity to fabricate. This argument had language in it like: The defendant has a benefit, unlike all the other witnesses. This argument had language like: That gives you a big advantage.

That kind of formulation, I think, does come dangerously close to commenting on the exercise of a right. But I am not going to grant habeas relief on that ground. The Supreme Court has made plain that even when error is committed in the prosecutor's summation, harmless error analysis has to be looked at. And, generally, a single comment by a prosecutor in an otherwise appropriate summation will not give rise to a finding of constitutional deprivation.

Now, erroneous comment in this case, if it was erroneous, did deal with a constitutional right. And so I have to weigh it more heavily for that reason and, mindful of what counsel for

plaintiff has said, I recognize that this was also a close case. But I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from this remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind, as counsel pointed out to me, is the appropriate formulation, that there was any prejudice here or that I have any concern that this may have swayed the verdict.

I would not, for instance, that in a case in which the Second Circuit did grant habeas relief because of a prosecutor's improper remarks, Floyd versus Meechum (Ph.), the severity of the prosecutorial misconduct was so much greater than this. I mean, the prosecutor characterized the defendant as a liar thirty-five times in that case, made repeated references to the defendant's failure to testify, and impermissibly asked the jury to pass on the prosecutor's personal integrity and professional ethics.

That set of circumstances is so far removed from what occurred here that I really don't think, looked at in context, that this comment, however close I think it is to the lines, would warrant habeas relief.

And so I am going to deny the petition. But because I recognize the seriousness of the issues here I will grant a certificate of probable cause to appeal and you can file notice of appeal, seek further review for your client.

10a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
RAY AGARD,

Petitioner,

ORDER
CV-95-2239 (RR)

- against -

LEONARD PORTUNDO,
Superintendent, Fishkill Correctional
Facility,

Respondent.
-----X

APPEARANCES:

RAY AGARD

Inmate No. 91-A-4160
Fishkill Correctional Facility
Box 307
Beacon, New York 12508
Petitioner

BEVERLY VAN NESS, ESQ.

377 Broadway
9th Floor
New York, New York 10013
Attorney for Petitioner

THE HONORABLE DENNIS C. VACCO
ATTORNEY GENERAL OF THE STATE
OF NEW YORK

120 Broadway
New York, New York 10271
Attorney for Respondent

11a

THE HONORABLE RICHARD A. BROWN
QUEENS COUNTY DISTRICT ATTORNEY

125-01 Queens Boulevard
Kew Gardens, New York 11415
Attorney for Respondent

RAGGI, District Judge:

For the reasons stated on the record of oral
argument on March 15, 1996, the petition for a writ of habeas
corpus is DENIED and a certificate of probable cause to appeal
is GRANTED.

SO ORDERED

Dated: Brooklyn, New York
March 15, 1996

REENA RAGGI
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 336 -- August Term, 1996

(Argued: October 24, 1996 Decided: July 3, 1997)

Docket No. 96-2281

Ray Agard,

Petitioner-Appellant,

v.

Leonard Portuondo, Superintendent
of Fishkill Correctional Facility,

Respondent-Appellee.

Before OAKES, VAN GRAAFEILAND, and WINTER, Circuit Judges.

Ray Agard appeals from the denial of the writ of habeas corpus entered March 21, 1996, in the United States District Court for the Eastern District of New York, following his conviction for first degree sodomy and two counts of third degree weapons possession. Held: The prosecutor's remarks in summation that Agard's presence in the courtroom during trial enabled him to tailor his testimony to meet the state's evidence were harmful constitutional error.

Reversed and remanded.

Judge Winter concurs in a separate opinion; Judge Van Graafeiland dissents in a separate opinion.

Beverly Van Ness, New York, NY, for Petitioner-Appellant.

Ellen C. Abbot, Assistant District Attorney, Queens County, Kew Gardens, NY (Richard A. Brown, District Attorney, Steven J. Chananie and Robin A. Forshaw, Assistant District Attorneys, of counsel), for Respondent-Appellee.

OAKES, Senior Circuit Judge:

Appellant Ray Agard appeals from the denial of the writ of habeas corpus dated March 15, 1996, and entered March 21, 1996, in the United States District Court for the Eastern District of New York, Reena Raggi, Judge.

Petitioner was convicted on February 25, 1991, in the Supreme Court of the State of New York, Queens County, Justice Arthur J. Cooperman presiding, of first degree sodomy and two counts of third degree weapons possession. He was sentenced to concurrent terms of 10 to 20 years' and 3 1/2 to 7

years' imprisonment. Following the December 20, 1993, dismissal of one of the weapons possession counts and affirmance on the other counts, People v. Agard, 199 A.D.2d 401, 402, 606 N.Y.S.2d 239, 240 (2d Dep't 1993), Agard's application for leave to appeal was denied, Judge Ciparick, People v. Agard, 83 N.Y.2d 868, 613 N.Y.S.2d 129, 635 N.E.2d 298 (1994). Agard then petitioned for the writ of habeas corpus pursuant to 28 U.S.C. SS 2254. The district court denied the petition, rejecting Agard's claims that his Sixth and Fourteenth Amendment rights had been violated at trial, but granted him a certificate of probable cause, permitting him to pursue this appeal. Transcript of Civil Cause for Status Conference/Hearing at 23, Agard v. Portundo (sic), No. CV-95-2239 (E.D.N.Y. March 15, 1996) (hereafter "District Court Transcript"). Agard now appeals to this court, asserting that the trial court erred in 1) refusing to permit defense counsel to question the victim about her prior sexual history; 2) limiting

Agard's expert's testimony regarding the amount of force required to sustain rectal trauma during anal sodomy; and 3) permitting the prosecution to imply in closing arguments that petitioner, by virtue of being present in the courtroom throughout trial, gained the unique opportunity to fabricate his testimony to meet the state's evidence. We find no error on the first point. The second ruling, while erroneous, does not constitute harmful or constitutional error. The trial court's ruling on the last point, however, infringes upon Agard's constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments, and constitutes harmful error. We therefore reverse the district court and remand.

I

Facts

Agard met Nessa Winder and Breda Keegan, the complainants in the criminal action, at a Manhattan bar and night club on Friday, April 27, 1990. Petitioner's testimony and that of his friend and defense witness Adolph Kiah largely -- though not entirely -- squares with the complainants' story about the events of the following weekend. The witnesses agree that Agard and Winder started a sexual relationship in the wee hours of Saturday morning; spent part of Saturday afternoon on the beach with Keegan and Agard's roommate Freddy; and returned to Agard's apartment for a nap, but stayed until morning. The People and petitioner, however, presented conflicting stories about the extent of that sexual relationship, as well as what occurred a week later on the morning of Sunday, May 6, 1990. The People alleged that the petitioner committed an assault and, using threats and violence, eight acts of rape and forcible sodomy against Winder. Agard, by contrast, testified that he and Winder woke up after a night out on the town, engaged in consensual vaginal intercourse and then fell back asleep for several hours, when upon reawakening a quarrel erupted over the lateness of the hour during which she scratched his lip and he struck her.

A. The People's Case

The People's case consisted of testimony from police investigators, medical experts and Keegan and Winder. At the time of trial, Winder and Keegan were both twenty-three year old women, and friends of eight years. They each moved to the United States from Ireland in 1989, and soon became roommates, sharing a Brooklyn apartment with two other people. On the evening of April 27th, Keegan and Winder went to the Cavaculum, a bar in lower Manhattan. Winder recalled

Agard approaching the women and offering to buy them drinks. He was "friendly" and the three went together downstairs to the club's dance area. Agard later invited Winder back to his apartment and she accepted. As she recalled, they were getting along "very well." Before they departed, Agard gave Keegan the telephone number to his apartment so she could call to say she had made it home safely.

Agard shared the top floor of a house in Queens with three roommates. Their landlady occupied the ground-floor apartment. Winder was introduced to Agard's roommate Freddy. Agard, who had earlier remarked that he carried a gun when riding the subway, showed Winder an automatic handgun kept in his closet. They then watched "blue" movies depicting mainly anal intercourse. Winder recalled Agard "mentioning" anal intercourse and "motioning that way" later that night when the two had sex, but she told him that she was not "into it" and "just said no." Winder testified that they did not engage in anal intercourse on that day, but did engage in consensual vaginal and oral sex before falling asleep. In the morning, they had intercourse again.

After a trip to a beach on Staten Island with Freddy and Keegan, Agard and Winder returned to Agard's apartment where they spent the night. Winder testified that she awoke at midnight, hoping to return to the Cavaculum where she and Agard had planned to meet Keegan, but Keegan could not be reached by phone and Agard did not want to go out again. After Agard attempted to initiate sex, Winder explained that, because she was expecting a boyfriend from England, she felt "we shouldn't go on like this." Winder testified that they did not engage in sexual relations that night.

The following week Agard made several attempts to

contact Keegan and Winder. He suggested that he have dinner on Thursday night with Keegan, whose job was located near Agard's, but Keegan was not home when he called her to arrange the date. On Saturday, Agard called the women several times to see if they wanted to meet again at the Cavaculum. After he said that he would not call again, the women called him and agreed to meet at the club.

The women arrived late and found Agard, who was "short" with them, and Freddy. The four drank and talked for several hours. Cocaine was also used by at least some members of the party, including Winder. Winder testified that she eventually became drunk and blacked out: the last thing she recalled from that evening was Agard's friend Kiah arriving and the group making plans to go to another club. Keegan testified that Winder, although drunk and tired, was still "walking and talking" even after the time of her memory lapse. Keegan explained that she, Winder, Agard, Freddy, and Kiah, along with two other women who needed a ride, left for the other club in Kiah's car. On the way, Winder sat on Agard's lap in the front seat, but was not physically affectionate because she was asleep.

Only the two women passengers were allowed into the second club which was closing up when the group arrived. The party of five moved on to a bar in another neighborhood where they continued to drink. Keegan recalls that Winder was asleep or falling asleep, and did not even drink her drink. Sometime between 4:00 and 4:30 in the morning, the party left the bar. Keegan recalls wanting to return to her apartment in Brooklyn with Winder, but at Agard's suggestion the group returned to his apartment.

Kiah and Freddy left to buy beer while Agard let the women into his apartment. They settled into Agard's bedroom.

Keegan testified that Winder immediately fell asleep, fully-clothed, on Agard's bed. When Keegan indicated that she wanted to call a cab, Agard responded that "he had sent his friends for beer and the least [they] could do is stay to have a beer after he had gone to that amount of trouble." According to Keegan, Agard became verbally abusive and threatening. He called her "Gaelic," told her to get her "monkey ass out of the house," said "he was going to smash [her] face in," and ordered her to "shut the fuck up."

He then went over to a chest of drawers against the wall and took out a gun. After clicking a cartridge into the handle, Agard placed the gun against Keegan's head, saying, "I'm going to give you three seconds to shut up." Agard then put the gun back into the drawer and continued to "abuse" Keegan until Kiah and Freddy returned with beer. Agard, by Keegan's recollection, told them "to get the bitch out of the house or he was going to hurt her"

Keegan asked Agard to follow her into Freddy's room so they could discuss what was making him so mad. They moved into the other room where Agard continued to threaten her, saying that she would "never leave the house alive" and that she could go "if you (Keegan) give both my friends head." Agard continued to change his mind, ordering Keegan to leave and then telling her to stay in Freddy's room. Keegan pleaded to see Winder, but when she was allowed into the bedroom Winder could not be awakened. Returning to the kitchen, Keegan found Kiah preparing to leave. Although initially reluctant, Keegan eventually decided to leave with Kiah. As she headed out the door of Agard's apartment and down the stairs, Keegan brushed by Agard, who turned and grabbed her around the neck. Keegan screamed, and he let her go, cursing her for getting him in trouble with his landlady. Keegan testified that she told Kiah during the trip to Brooklyn that Agard had threatened her with

a gun.

Keegan arrived home at about 6:00 in the morning and went to bed. At 9:00 a.m. she called Agard's apartment to speak with Winder, but he answered the phone and hung up. She did not try again until 1:00 p.m., at which time she was told Winder had left. Agard immediately called Keegan back to tell her how mad he was at her for having awakened his landlady, and to threaten her that he would call again in a few days to let her know whether they had "a major fucking problem."

Winder testified that she awoke at 9:30 a.m., wearing only her "vest,"¹ unable to remember how she got where she was, but in a rush to get home because she was expecting her English friend. She remembered that at some point Agard had asked her for "a fuck" and she said "no." She asked Agard to call her a cab, then tried to do so herself. He put the phone down and began to "curse [her]," saying she was a "no good ten-cent whore" and that she had "planned this." He also "curs[ed]" Keegan, saying that she had awakened the landlady, and called the women "no good white trash."

Winder began to get dressed and Agard came up from behind her and slapped her in the face. He tried to back her against the wall, but she moved to the other side of the bed where he kicked her. He told her she had "two choices, either I [Winder] do things his way or I would like the other thing less." He then came over to her and "put his penis into her mouth" and pulled on her hair. She pulled away from him, saying she "couldn't do it anymore." Agard continued to insult Winder. When she repeated that she could not do what he wanted, he

1. It is not clear from the record what Winder meant by "vest."

took his gun from the drawer and began "putting cartridges into it," at which point Winder said "okay" and allowed him to resume the oral sodomy.

Winder said that she "needed to go to the bathroom," and Agard permitted her to leave. After initially locking herself in, she fled the bathroom for Freddy's bedroom where she grabbed Freddy and begged him for help. She was able to bring Freddy with her into Agard's room, but Freddy left when ordered out. Recalling Agard's comment about the landlady, Winder screamed, causing him to punch her three times in the face. Agard continued the verbal threats, ordered Winder to leave, but told her to "make [him] come first." She "managed to scratch his lip," but could not see any injury her scratch may have produced. He threatened her first with a beer bottle, holding it above her head as if ready to strike. When she still refused to engage in sex, he retrieved the gun and put it to her head, saying "[t]his is goodbye." At this point, Winder agreed to comply with his demands.

She asked to return to the bathroom for a drink of water. He refused, but brought her a beer for her thirst. Agard went to the bathroom himself, and Winder again fled to Freddy's bedroom. Petitioner followed her, picking her up off Freddy's bed and carrying her "by the head and by the hair" back to his own bedroom, where he threatened to kill her.

Agard raped and sodomized Winder while slapping her buttocks before allowing her to return to the bathroom. She returned to his bedroom without making further efforts to flee, and he committed additional acts of anal sodomy, oral sodomy, and rape. Winder feigned a seizure in an effort to escape, but as soon as she "resumed normality," he raped her again.

Finally, Agard's landlady called the apartment twice, allowing Winder an opportunity to dress. Agard then called a taxi to take her back to Brooklyn and escorted her downstairs, saying "[d]on't dare call the police" and threatening her if she did. Winder got into the cab, but did not go far because she had no money. The driver dropped her off down the street from Agard's apartment where she was eventually able to phone Keegan. Winder hid until Keegan came for her, and the two women went to the police station.

That afternoon Doctor Ardeshir Karimi examined Winder at Elmhurst Hospital. He did not see any abnormality or signs of trauma in Winder's vagina or anus. Dr. Karimi took samples for a Vitullo kit from Winder's mouth, vagina, and anus. Later testing by Detective Robert Lewis determined that only the vaginal sample was positive for spermatozoa.

The next day, May 7, 1990, Winder and Keegan found the following message on the answering machine in their shared apartment:

You will know who this message is for. After careful consideration of this entire situation, it was my fault. I was a golden asshole. The only thing I can do is say I'm sorry and that's it. I'll never bother you again. Live safely and peacefully. Goodbye.

At trial both women identified Agard's voice on the tape.

On May 8, 1990, Detective Philip Giardina executed a

search warrant at Agard's home where he recovered a .45 caliber automatic handgun and two magazines containing shells. After his arrest the same day, Agard first denied that he had a gun, then later admitted to having it but said it was not real, did not work, or belonged to a friend. As to the sex crimes, Agard did not equivocate: he stated that he had consensual sex with Winder, that they got into a fight, and that she scratched him and he "mushed her face."

B. The Defense's Case

Agard corroborated much of the complainants' account about the first weekend after they met. His story, however, departed from Winder's in the following respects: he said that on their first night together, they engaged in consensual, anal intercourse, using lubricants, and that they engaged in consensual intercourse on Saturday night. Agard also testified that Winder found his gun in the closet when she borrowed his bathrobe, and that she tried on the holster.

The discrepancies between Agard's and the complainants' stories became pronounced with respect to the events of the second weekend. Agard testified that, during the drive to the second nightclub, Winder was not only awake but kissing and fondling him as she sat on his lap in the front seat of the car. He also recalled that Keegan had not wanted to return to his home in Queens, but that Winder had had no such reservations.

According to Agard, Keegan was "loud" about her desire to go home when the group arrived at his apartment in Queens. Agard testified that as he escorted his "agitated" guest out to Kiah's car, they passed his landlady who was "upset" about the noise Keegan was making. Agard returned to his room

and went to sleep on his bed next to Winder. It was about 6:00 a.m.

Three hours later, Agard and Winder awoke, and, according to Agard, had voluntary vaginal sex before falling asleep again. He testified that they reawakened sometime between noon and 1:00 p.m., and that Winder was "upset," "kind of hyper," and concerned that her boyfriend was going to kill her. Trying to quiet her, he approached her from behind and took hold of her shoulders. She turned and smacked him, taking hold of his lower lip and scratching him on the inside of his mouth. Reflexively, he used the palm of his open hand to push her away, "mush[ing]" her in the eye. When the cab he had already called arrived, he gave Winder \$25 and sent her on her way. Although he was "annoyed" about the trouble the women had caused him with his landlady, he was not "angry." The following day he called to apologize "because [he] felt that [he] should not have mushed her in the face."

Kiah also testified for the defense, contradicting Keegan on several points: he recalled that Winder embraced and kissed Agard during the drive to the second club. He also remembered that she was talking and drinking with the others at the last bar, not asleep as Keegan recollected. He further said that Keegan never told him that Agard threatened her with a gun.

Nineteen counts against Agard were submitted to the jury, two concerning Keegan, fourteen associated with Winder. The remaining three counts were weapons charges. The jury acquitted Agard on all but two counts relating to the women: he was found guilty of one of the two anal sodomy counts, and of felony assault in which rape was the underlying felony. He was also convicted of two counts of third degree weapons

possession. The trial court dismissed the assault conviction as repugnant to the rape acquittal, and one of the third degree weapons possessions convictions was reversed on appeal.

II

Issues

A. Limitation of Victim's Testimony

Agard's first assertion of constitutional error relates to the trial court's limitation of defense counsel's attempt to cross-examine Winder on whether she had ever engaged in anal intercourse with persons other than Agard. At a sidebar, the defense asserted that the testimony was not being sought for "promiscuity purposes or anything of that nature." The argument was that the prosecution had attempted to overcome the medical evidence showing no anal trauma, by eliciting on direct examination Winder's testimony that she did not struggle during the incident; this, Agard's counsel asserted, "opened the door" to sexual history testimony probative of what the medical record ought to reflect. The trial court ruled that the defense's inquiry about prior sexual history was forbidden by the state rules of evidence, and that any probative value was far exceeded by the prejudice. It also rejected the defense's suggestion that the testimony be allowed with a limiting instruction to the jury.

Agard claims that the trial court's ruling denied him the ability to present his defense, thereby violating his Sixth and Fourteenth Amendment rights to confrontation and to due process. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636 (1986); Williams v. Lord, 996 F.2d 1481, 1483 (2d Cir. 1993); Rosario v. Kuhlman, 839 F.2d

918, 924 (2d Cir. 1988). In assessing this claim, we note that a state may restrict a defendant's introduction of evidence without violating the constitutional right to present a defense so long as those restrictions are neither "arbitrary [n]or disproportionate to the purposes they are designed to serve." Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987). See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967).

Rape shield statutes have been enacted by Congress and the majority of states. Fed. R. Evid. 412; Michigan v. Lucas, 500 U.S. 145, 146, 111 S. Ct. 1743, 1744, 114 L. Ed. 2d 205 (1991). The New York law relied upon by the trial court bars, as a general rule, the use at trial of evidence of an alleged victim's prior sexual conduct with persons other than the defendant, but grants the court discretion to admit such evidence in the interest of justice. N.Y. Crim. Proc. Law SS 60.42 (McKinney 1992). This discretionary power, however, must be exercised within the boundaries of the Sixth and Fourteenth Amendments.

Petitioner argues to this court that the questions he intended to ask Winder are not the kind that rape shield statutes such as New York's are intended to prevent. The interrogation of Winder was, he asserts, not an attempt to harass her or soil her name with intrusive questions and innuendo about promiscuity. Nor did he wish to show that she had a propensity to consent to anal intercourse which was demonstrated by her past behavior. In this appeal, he avows that he sought a negative answer to his questions. Supposedly, had Winder answered that she had little or no experience with anal sodomy, her response would have strengthened the importance of the medical evidence showing no anal trauma. Furthermore, he points out that Winder already had admitted to meeting a man at a bar and going home

with him to engage in sexual intercourse; that the prosecutor had said to the jury that the complainant was "sexually active"; and that Winder had testified that she told Agard that she was not "into" anal intercourse, thereby suggesting she was inexperienced with that activity but doing so without specificity. Petitioner would have us find that, because these details were before the jury, any further testimony about Winder's past could do little additional harm.

We disagree with petitioner that his counsel's questioning of Winder was obviously outside the usual application of the rape shield laws. Rape shield laws serve the broad purpose of protecting the victims of rape from harassment and embarrassment in court, and by doing so seek to lessen women's historical unwillingness to report these crimes. Yet they also serve a second purpose: they reinforce the trial judge's traditional power to keep inflammatory and distracting evidence from the jury. See *Sandoval v. Acevedo*, 996 F.2d 145, 148-49 (7th Cir. 1993) (citing *Lucas*, 500 U.S. 145, 111 S. Ct. 1743). In this respect, rape shield laws are an example of the court's traditional power to exclude evidence the prejudicial character of which far exceeds probative value. Evidence of past sexual conduct and particularly of, perhaps, more unusual activities such as anal intercourse, is likely to distract a jury from the contemporaneous evidence it is asked to consider. And as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act. For this reason, we believe that this second purpose of rape shield laws is well-served by excluding defense counsel's proposed questions to Winder. We find that the New York rape shield law is a restriction that both facially and as applied in Agard's case was neither arbitrary nor "disproportionate to the purposes [it was] designed to serve,"

and therefore does not violate any constitutional prohibition.

Furthermore, we are not persuaded by Agard's assertion that the other purpose of the rape shield statutes is not at play. His argument is weakened by an inconsistency in his own position: he assertedly expected Winder to answer that she "never" or only "once or twice" engaged in this sexual activity. Pet. Br. at 44. But Agard himself testified that he and Winder engaged in anal intercourse on the weekend they met, a statement clearly conflicting with the answer the defense now claims it anticipated. If Winder testified that she had on previous occasions consented to anal intercourse with other partners, her testimony would have been precisely the kind of forbidden sexual "propensity" evidence supporting Agard's claim that the two had engaged in consensual sodomy on their first night together. While a negative answer could have provided some additional measure of support -- however slight -- for the defense's argument concerning the medical record, an affirmative answer could also have aided its cause. In light of this wrinkle in petitioner's position, we, like the district court, are "skeptical" that the defense truly sought the answer "never," and that it truly had no intent to embarrass Winder or lessen her credibility with the jury. Regardless of Winder's answer, her testimony would not have altered the ultimate verdict, and it carried a risk of distracting and prejudicing the jury. We therefore agree with the state and district courts that the trial court's ruling on this point was not erroneous.

B. Limitation on Expert Testimony

Agard's second assertion of error relates to the trial court's limitation on the testimony of an expert witness for the defense. Winder testified that, when she was forced to engage

in sodomy, her anus was "sore" and she twice had to pull away from Agard due to pain. On cross-examination, the defense elicited the following testimony from Winder:

Q. I believe you also testified that during this incident you say that [Agard] forced his penis into your anus; is that correct?

A. Yes.

Q. And that was against your will; correct?

A. Yes.

Q. And in fact that hurt, made it sore?

A. Yes.

Q. And that it's your testimony that at some subsequent time [he] again forced his penis into your anus?

A. Yes. Forced -- yes.

Q. And that hurt very much; correct?

A. Yes.

Later in the trial, the prosecution established that Winder did not struggle with Agard because "[she] knew it would be more

painful" if she resisted.

The prosecution asked its expert witness, Dr. Karimi, questions about the probability of discernible trauma to the rectum as a result of anal penetration. When asked whether "if a woman during anal intercourse felt pain, does that mean you would see trauma," Karimi replied "[n]o." Asked to explain, he said that "for . . . trauma you have to have moderate or severe force. If the force is less than moderate, there wouldn't be any trauma."

The defense countered with expert testimony from Dr. Jeffrey Gilbert, who had not examined Winder but had reviewed her medical records. Based on his experience of conducting "thousands" of pelvic examinations, he testified that there is "very often" visible evidence of injury to the rectum when individuals engage in voluntary anal intercourse. He further explained that "at times with the presence of lubrication the injuries are still present." On cross-examination, he adopted the prosecutor's term "sometimes" in the place of "very often," and also acknowledged that trauma is not necessarily the result of such activity.

Defense counsel also posed a number of hypothetical questions to Dr. Gilbert concerning the likelihood of trauma as a result of "forcible" anal intercourse "against the will" of the victim who felt pain and soreness. All were objected to and the objections sustained by the trial court. The defense argued that the questions were proper, because they comported with Winder's testimony on cross-examination that Agard "forced" his penis into her anus. The prosecution countered that the questions were not relevant to the case, because the victim alleged that threats -- not physical force -- were used by Agard

to overcome her will. Or, in the prosecutor's own words, "[y]ou didn't ask your expert if there was no struggle would there be trauma." The court continued to sustain prosecution objections to any question containing the words "force" or "forcible" on both direct and redirect examination. On summation, the prosecution paraphrased both experts' testimony, "[Winder] told you she didn't struggle when he was inside of her Dr. Gilbert and Dr. Karimi told you that if there is no struggle, there is not always going to be trauma, and I ask you to rely on [their] testimony" The defense moved for a mistrial based on improper curtailment of its examination, and continued to press its disagreement with the court's decision through the trial and to the Appellate Division, Second Department.

Our analysis of Agard's contention is aided by the express conclusion of the Appellate Division that curtailment of the defense's expert testimony was improper under New York law (though the court did hold the error to be harmless). Agard, 199 A.D.2d at 402-03, 606 N.Y.S.2d at 240-41 ("the hypothetical question posed to the defendant's expert was based on facts which were 'fairly inferable from the evidence,' which included indications of physical force as well as threats") (citing, *inter alia*, Tarlowe v. Metropolitan Ski Slopes, Inc., 28 N.Y.2d 410, 414, 322 N.Y.S.2d 665, 667, 271 N.E.2d 515, 516 (1971)). We find that, while expert testimony is limited by the requirements of relevancy and by the trial court's traditional discretion to prevent prejudicial or confusing testimony, these considerations did not warrant keeping this important information from the jury.

The trial court's rulings demonstrate a concern over an ambiguity in the words "force" and "forcible." Both terms may be used to mean either physical compulsion or doing something against the will of another. In the latter instance, physical

coercion may not be present; for example, as the prosecution alleged in this case, threats can be used to overcome the will of another. The prosecution was rightly concerned that the defense's questions to its expert could have led the jury to misunderstand exactly which meaning of the word "force" was intended. Indeed, as the Appellate Division noted, the mixed roles of threats and physical force were at issue in the trial, as Winder alleged acts of physical force, including a kick, punches and slaps on her buttocks during the anal penetration. Agard, 199 A.D.2d at 402, 606 N.Y.S.2d at 240.

We agree that the term "force" is ambiguous and potentially misleading. However, that ambiguity was not a reason to exclude the expert testimony entirely, at least when the degree of force exercised by the defendant was at issue in the trial. Rather, it was a proper subject for the prosecutor's cross-examination of Dr. Gilbert. The prosecution could have brought out the fact that Winder did not struggle with Agard, and asked what effect that fact would have on Gilbert's opinion.

Moreover, the defense was not permitted to ask certain questions which to some extent clarified the meaning of the term "force" and which further used specific language taken from Winder's testimony. For example, defense counsel asked:

Now, could you tell us within a reasonable degree of medical certainty what sort of findings you would expect if a woman claimed to have . . . forcible anal intercourse against her will, the second time longer than the first, both times being sore and both times being painful?

These additional details gave the defense's interrogation further

grounding in complainant's testimony, thereby making those questions even more clearly relevant. We therefore find error in the trial court's ruling.

Our question, however, is whether the ruling, viewed in light of the whole record, deprived Agard of a fundamentally fair trial. Rosario, 839 F.2d at 925. As we outlined in our discussion of the rape shield statute, the Sixth and Fourteenth Amendments to our Constitution guarantee a criminal defendant a meaningful opportunity to present a defense. Crane, 476 U.S. at 690, 106 S. Ct. at 2146. Erroneous evidentiary rulings rarely rise to the level of harm to this fundamental constitutional right. To isolate those few situations where such mistakes injure constitutional rights, this court applies the standard of "materiality" as set forth by the Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). See Rosario, 839 F.2d at 924; Taylor v. Curry, 708 F.2d 886, 891 (2d Cir. 1983). Agurs stated:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor

importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13, 96 S. Ct. at 2401-02 (footnotes omitted).

In order to evaluate the importance of the additional expert testimony in this case, therefore, we must look at the strength of the evidence supporting Agard's conviction.

On direct review, the Appellate Division characterized the evidence of his guilt as "overwhelming." Having reviewed the entire record of the trial, we cannot agree with that characterization, nor are we required to accept it on habeas review. Annunziato v. Manson, 566 F.2d 410, 413 (2d Cir. 1977). We believe that the lack of medical evidence on the one charge -- forcible anal sodomy -- for which the jury convicted Agard suggests that the jury decided the case primarily, if not solely, upon the credibility of Agard, Winder, and Keegan. We simply do not know the reasoning behind the verdict.² We do

2. Undoubtedly, the verdict was mixed and therefore somewhat confusing. Indeed, during a discussion of the charges to be given to the jury, the trial court commented, "you know, are they going to believe the sodomy counts and not a rape count? I mean it doesn't make any sense." Yet the verdict is not necessarily the result of a jury compromise. The jury could have credited large parts of Winder's testimony about the events of Saturday night and Sunday morning, but nonetheless concluded that, even despite the threats and violence she described, she did not express her unwillingness to engage in oral sex or vaginal intercourse with sufficient clarity to make Agard guilty of those crimes. The jury could also have believed her testimony that anal penetration occurred. It could further have believed that she was unwilling to engage in anal intercourse, and that Agard knew as much from their conversation the previous weekend. If the jury believed this testimony, it would explain the anal sodomy conviction as well as the acquittals on the charges of rape and forcible oral sodomy. Alternatively, of course, the numerous acquittals may indicate that the jury did not believe most of Winder's and Keegan's testimony. In any event, credibility was clearly the primary issue.

know, however, that, as the district court duly noted, Winder and Agard presented sharply conflicting stories making their credibility the central issue in the trial;³ that there was very little

3. Even the State agrees that credibility was the main issue at trial:

Defense counsel, in his summation, argued vigorously that the prosecution's witnesses had fabricated the allegations against petitioner, and that petitioner's testimony was more credible than the testimony of the prosecution's witnesses. He asked the jury to compare the victim's testimony with petitioner's testimony, and to "consider the reasonableness of the two different stories." Defense counsel also argued that petitioner's description of the events of May 6, 1990, was a "more reasonable and natural extension of the relationship that started the weekend before," and described petitioner's testimony as "consistent."

In response, the prosecutor argued that Winder had been victimized by petitioner even though petitioner wanted the jury to think that he was the victim. She asked the jury to consider that petitioner, rather than (sic) the victim, was the person who had been less than straightforward because he was an interested witness. Further, the prosecutor pointed to the fact that petitioner had had the opportunity to hear all of the testimony in the case before he testified. These comments fairly responded to defense counsel's statements that the victim lied, and were therefore proper.

State's Br. at 46-47 (citations to record omitted). Likewise, the district court:

.... This was a credibility decision for the jury. And I read very carefully the testimony of both the defendant and the victim and there is no question in my mind that this could not hope, on a cold record, to make credibility determinations between the people. That would not be my task in any event. But in some cases it's easier to get a sense for where the credibility problems were or were not. This is a more more difficult case.

I also recognize that the jury did acquit on a number of counts and that it is really only on this issue relating to the anal intercourse that a guilty verdict was returned and I think it is appropriate to look at this carefully. But I will say, parenthetically, that while it is not relevant to my consideration of constitutional deprivations, when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a

evidence beyond the medical findings presented to the jury to support or undermine the testimony of the two most important witnesses; and that the jury's verdict does not demonstrate any clear resolution of the credibility question. In light of these observations, we think that the evidence of Agard's guilt cannot be characterized as "overwhelming." We thus reject this basis for the conclusion of the Appellate Division that the error was harmless.

The Appellate Division also stated, however, that it found the erroneous evidentiary ruling to be harmless because "the defendant's expert was permitted to testify that individuals who engaged in voluntary anal intercourse, even using lubricants, frequently suffered from conspicuous rectal trauma." Agard, 199 A.D.2d at 403, 606 N.Y.S.2d at 241. We agree that this opinion evidence allowed Agard to make an argument about the significance of the lack of medical evidence of sodomy, and thereby saved the erroneous ruling from rising to the level of constitutional harm because it did not deprive him of the opportunity to make an argument to the jury. Indeed, the facts of Agurs support this conclusion. The Court there concluded that the jury's ignorance of the victim's criminal record was not material to the defendant's self-defense defense, in part because evidence was already on record of the victim's propensity for violence, and thus the record was "largely cumulative." Agurs, 427 U.S. at 114, 96 S. Ct. at 2402. Here, too, additional opinion testimony would only add further support for a defense argument clearly before the jury.

wholesale verdict, it wrestled with this. That is why there were four days of deliberation.

District Court Transcript at 14-15.

C. Prosecutor's Summation Remarks

Agard's third and final assertion of error on appeal is that his rights to confront the witnesses against him and to have a fair trial were violated by the prosecutor's closing remarks. In her summation, the prosecutor referred to Agard as "the one who had an answer for everything" and stated that "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." At the end of summation, she stated:

You know, ladies and gentlemen, unlike all the other witnesses . . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.

[objection overruled]

That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

[objection overruled]

He's a smart man. I never said he was stupid. . .
He used everything to his advantage.

Petitioner's counsel later moved for a mistrial based on these remarks, stating that "comment[s] on Agard's presence at the trial [were improper]. He has the absolute constitutional right to be here. . . . It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial." In denying that motion, the trial court judge responded that "[t]he fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as (sic) a matter of fact." On Agard's direct appeal of his conviction, the Appellate Division stated simply that it found his argument on this point to be meritless. Agard, 199 A.D.2d at 403, 606 N.Y.S.2d at 241.

On habeas review, the district court stated that it was "troubled by" these comments, as they came "dangerously close to commenting on the exercise of a [constitutional] right." District Court Transcript at 21, 22. The court ultimately determined, however, that the remarks were not so prejudicial as to warrant habeas relief.⁴

4. We are not certain whether the district court reached this conclusion because it was unsure that error had occurred in the first place, or because it was unsure whether that error was harmful. Compare District Court Transcript at 22 ("erroneous comment in this case, if it was erroneous, did deal with a constitutional right.") (emphasis added) with id. (" . . . I recognize that this was also a close case. But I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from this remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind . . . that there was any prejudice here or that I may have any concern that this may have swayed the verdict." See also id. at 23 ("I really don't think, looked at in context, that this comment, however close I think it is to the line, would warrant habeas relief."))

1. Constitutional Error Analysis

Although we have unearthed no federal case which examines this issue, numerous state courts have addressed it. The highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that such prosecutorial commentary is improper. State v. Cassidy, 672 A.2d 899, 905-08 (Ct. 1996); State v. Jones, 580 A.2d 161, 162-63 (Me. 1990) (prosecutor's comment was improper but defendant failed to preserve issue for appeal); Coreas v. United States, 565 A.2d 594, 604 (D.C. Ct. App. 1989); State v. Hemingway, 528 A.2d 746, 747-48 (Vt. 1987); Commonwealth v. Person, 508 N.E.2d 88, 90-91 (Mass. 1987); Dyson v. United States, 418 A.2d 127, 131 (D.C. Ct. App. 1980); State v. Johnson, 908 P.2d 900, 902-03 (Ct. App. Wa. 1996). See also, Commonwealth v. Elberry, 645 N.E.2d 41, 42-43 (Mass. App. Ct. 1995) (although comments constituted error, they were immediately cured by trial court); Jenkins v. United States, 374 A.2d 581, 583-84 (D.C. Ct. App. 1977). On the other hand, the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas have held otherwise. See People v. Buckey, 378 N.W.2d 432, 436-39 (Mich. 1985) (disagreeing with People v. Smith, 252 N.W.2d 488, 492 (Mich. Ct. App. 1977) (comments, though ultimately harmless, were "inadvisable") and People v. Fredericks, 335 N.W.2d 919, 921-22 (Mich. Ct. App. 1983) (remarks seriously prejudiced defendant's case, which depended upon his own testimony)); State v. Grilli, 369 N.W.2d 35, 37 (Minn. Ct. App. 1985); State v. Robinson, 384 A.2d 569, 569-70 (N.J. Super. Ct. App. Div. 1978). These courts have addressed prosecutorial summation arguments virtually identical to the one made in

Agard.⁵

Other state courts have addressed similar comments of prosecutors during cross-examination of the defendant. Although many of the state cases rely upon and make reference to summation cases and cross-examination cases as though they were analytically interchangeable, we believe that they should be addressed separately because summation remarks raise constitutional issues which either are not present or are of less

5. Buckey, Grilli, and Robinson rejected the argument that the Sixth Amendment was violated by a prosecutor's commenting upon the defendant's unique opportunity for testimonial fabrication. In Grilli, the prosecutor had made this type of comment both during cross-examination and upon closing, thereby clouding the issue. Furthermore, defense counsel failed to object to the prosecutor's comments at either stage, thus waiving the defendant's right to review. It is therefore unclear to us exactly how much weight to assign to that court's exceedingly brief dismissal of the issue. See Grilli, 369 N.W.2d at 37 ("The prosecutor's cross-examination was not improper. The prosecutor was free to argue and attack appellant's credibility. Also, appellant failed to make any objection and waived his right to review of this issue. Similarly, the closing argument was not improper nor was any objection made to it." (citations and new paragraph omitted)). Robinson likewise briefly dismissed the issue, and also confused the question by discussing it as though it had arisen upon cross-examination even though it was actually made during summation:

It is well settled that when a defendant waives his right to remain silent and takes the stand in his own defense, he thereby subjects himself to cross-examination as to the credibility of his story. And the issue would involve whether the story had been fabricated. Here the issue of defendant's credibility was whether his testimony was tailored to that of the testimony of other witnesses, a perfectly proper.

Robinson, 384 A.2d at 570 (citations omitted). We therefore place little weight on the arguments raised by these cases, and center more upon those made in Buckey, though we do note that all three cases base their holding upon the principle that the prosecutor may properly argue to defendant's lack of credibility.

concern when made upon cross-examination.⁶ We today express no opinion as to the propriety or constitutionality of similar remarks made during cross-examination.⁷ We hold only that it is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. Such comments violate a criminal defendant's right to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.

6. On cross-examination, a prosecutor may legitimately question any witness about his opportunity and motivation to fabricate testimony. Such questioning goes to the witness' credibility, and the witness is afforded an opportunity to respond and repair the attack. Summation remarks, however, occur too late for the witness to rehabilitate his credibility and may, as in this case, occur too late for even his attorney to respond to the attack. *But see Sherrod v. United States*, 478 A.2d 644, 654 (D.C. Ct. App. 1984) ("This court has indicated it is impermissible for the prosecutor to comment in closing argument on appellant's exercise of his Sixth Amendment right to confront witnesses. Accomplishing the same result by cross-examination is no less objectionable, since the prosecutor thereby can also seek to have the jury draw impermissible inferences from appellant's exercise of his constitutional right to confront witnesses." *Id.* (citations omitted)).

7. In keeping with this decision, we do not (with one exception) address herein those cases which assessed similar comments made during cross-examination. We do note, however, that the D.C. Court of Appeals ruled it unconstitutional for a prosecutor to make such comments even upon cross-examination, *Sherrod*, 478 A.2d at 654, in contrast with several other courts which held that a defendant who takes the stand subjects himself to cross-examination as to credibility. *State v. Smith*, 917 P.2d 1108, 111-12 (Wa. Ct. App. 1996) (no Sixth Amendment violation); *State v. Hoxsie*, 677 P.2d 620, 622 (N.M. 1986), overruled on other grounds by *Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989) (same); *State v. Martin*, 686 P.2d 937, 941 (N.M. 1984) (no Fifth Amendment violation); *People v. Sims*, 648 N.Y.S.2d 542 (1st Dep't 1996) (no Fifth or Sixth Amendment violation).

The exception to our general omission of cross-examination cases may be found in note 12, *infra*, and accompanying text, discussing and distinguishing *Smith* on other grounds.

a. Defendant's Right to Confrontation

The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. Const. Amend. VI. This right applies to state as well as federal prosecutions via the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923 (1965). "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970) (citing *Lewis v. United States*, 146 U.S. 370, 372, 13 S. Ct. 136, 137, 36 L. Ed. 1011 (1892)).

We find that a prosecutor's summation remarks noting the defendant's unique opportunity to be present at trial infringe upon that constitutionally guaranteed right. The remarks invite the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and therefore penalize him for exercising that right. The comments, which imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented,⁸ force defendants either to forgo the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion. The Sixth Amendment does not permit those comments.

8. This not only implicates the right to be present at trial, but also the right to testify. *Cf. Brooks v. Tennessee*, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (statute which required a defendant to testify, if at all, prior to presentation of any other defense testimony, violated defendant's Fifth Amendment right against self-incrimination as well as Fourteenth Amendment right to due process). Other aspects of the infringement on the right to testify are discussed in Part II.C.2., *infra*.

The remarks are analogous to the tactic of suggesting to juries that guilt can be implied from a defendant's decision to exercise his Fifth Amendment right not to testify, a tactic which has been held unconstitutional. In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the Supreme Court explained:

[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614, 85 S. Ct. at 1232-33 (citations and footnote omitted). The Griffin Court recognized that such commentary effectively penalizes the defendant for exercising his Fifth Amendment rights, and held it unconstitutional to require

defendants to choose between their rights.⁹ We believe that Griffin principles are appropriately applied to the case at bar.

We therefore hold that the Sixth Amendment right to confrontation prohibits a prosecutor from commenting in summation that a defendant's testimony may be viewed in light of his presence in the courtroom during trial, because such comments violate the defendant's right to be present at trial. The Supreme Court has indicated that Sixth Amendment rights may at times be overcome by an important state interest. Maryland v. Craig, 497 U.S. 836, 850, 110 S. Ct. 3157, 3166, 111 L. Ed. 2d 666 (1990) ("[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."). See also, Davis v. Alaska, 415 U.S. 308, 319-20, 94 S. Ct. 1105, 1111-12, 39 L. Ed. 2d 347 (1974). We thus look to whether important reasons sufficient to justify the infringement upon the defendant's right to be present at trial existed here.

9. We have carefully considered and found distinguishable the Court's earlier holding in Raffel v. United States, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054 (1926). Raffel held that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his pre-arrest silence. See also Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). The Raffel Court reasoned that, once a defendant takes the stand in his own defense, he is subject to cross-examination on the topic of his pre-arrest silence. As we have already stated, issues raised on cross-examination may implicate constitutional rights less strongly than those raised only in summation. Raffel therefore is less on point than Griffin. It is also unclear whether Raffel principles remain good law. See Grunewald v. United States, 353 U.S. 391, 425-26, 77 S. Ct. 963, 984-85, 1 L. Ed. 2d 931 (1957) (Black, J., concurring) (questioning whether Raffel survives Johnson v. United States, 318 U.S. 189, 196-99, 63 S. Ct. 549, 553-54, 87 L. Ed. 704 (1943)); see also Jenkins, 447 U.S. at 245 n.10, 100 S. Ct. at 2133 n.10 (Stevens, J., concurring) (questioning whether Raffel survives Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)); United States v. Hale, 422 U.S. 171, 175 n.4, 95 S. Ct. 2133, 2136 n.4, 45 L. Ed. 2d 99 (1975) (declining to decide whether Raffel survives Johnson and Griffin.)

The State presents the argument made by the Michigan Supreme Court that such commentary is not improper because it is a fair attack upon a witness's credibility. The Buckey court reasoned that "[o]ppportunity and motive to fabricate testimony are permissible areas of inquiry of any witness," Buckey, 378 N.W.2d at 439,¹⁰ and stated that "the argument is perfectly proper comment on credibility." Id.¹¹ See also, Grilli, 369 N.W.2d at 37 ("[t]he prosecutor was free to argue and attack appellant's credibility.") We next assess whether the prosecutor's need to attack a testifying defendant's credibility is an important reason justifying an infringement of his right to be present at trial.

10. Even Buckey, however, conceded that "a prosecutor may, [not] in every case, argue that a defendant who has testified has fabricated his testimony merely because he has sat through his trial and heard the evidence. Thus, it cannot be said that every defendant will be faced with a choice between forfeiting one right so that he may exercise another — e.g., being present at trial, but not testifying so as to avoid the risk of prosecutorial comment that he fabricated testimony." Buckey, 378 N.W.2d at 439. Because, however, the court believed that the evidence in that case did support the prosecutor's inference of perjury, it deemed the remark to be a proper commentary upon credibility.

11. The court further stated: "To accept defendants' argument that they must choose between exercising their right to be present at trial and some other right would be to say that a defendant has the right to fabricate or conform testimony without comment." Buckey, 378 N.W.2d at 439. We disagree. Federal law unequivocally provides that a criminal defendant has no right to perjure himself in his own defense, Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971), and that his attorney may not knowingly permit him to testify falsely, Nix v. Whiteside, 475 U.S. 157, 173, 106 S. Ct. 988, 997, 89 L. Ed. 2d 123 (1986). Nothing in our holding is counter to this principle. It would be somewhat more accurate to say that our holding maintains the opportunity of a defendant to fabricate or conform testimony without comment, an opportunity granted by the Fifth and Sixth Amendments. For that matter, the very existence of the Fifth Amendment and its guarantee that a defendant may testify on his own behalf presents the opportunity of perjury; nevertheless, countervailing principles of criminal justice mandate that we not accept every opportunity to completely eliminate that risk. We decline to restrict a defendant's constitutional rights in order to prevent hypothetical perjury.

We take as the starting point of our analysis the distinction expressed by the Washington State Court of Appeals between a prosecutor's argument that a defendant has tailored his testimony to meet the state's evidence, and her argument that a defendant, by virtue of being present in the courtroom during trial, has gained an opportunity, unavailable to any other witness in the trial, to tailor his testimony to meet the evidence. Compare Johnson, 908 P.2d at 902 (state may not argue that, by virtue of attending trial, defendant has gained unique opportunity to tailor his or her testimony) with State v. Smith, 917 P.2d 1108, 1111-12 (Wa. Ct. App. 1996) (state may argue that defendant has tailored his or her testimony to state's proof). The remarks made in Smith may be permissible commentary upon the defendant's credibility as a witness, while those made in Johnson, centering upon his unique opportunity to fabricate testimony as the only witness able to personally hear all the evidence previously presented to the jury, are not permissible because they amount to nothing more than an attack upon the exercise of rights the Constitution grants criminal defendants.¹² Agard's prosecutor made remarks similar to those in Johnson, so we limit our discussion to such comments and do not reach the Smith-like remarks.

This distinction, as well as that made above between cross-examination questions and summation comments, is relevant to whether the need to dispute the defendant's credibility is so important as to overcome his right to confrontation. In the light of these distinctions, we think that the

12. Although the Washington Court of Appeals centered upon this point as the critical distinction between Johnson and Smith, Smith, 917 P.2d at 1112, we note a second important distinction: Johnson evaluated summation remarks while Smith examined cross-examination comments.

asserted need to comment upon Agard's credibility carries little weight on these facts. It is perfectly proper for a prosecutor to cross-examine a defendant about those portions of his testimony which have indicia of fabrication. When, however, a prosecutor raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens. Such commentary is not proper comment upon credibility. Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. Such tactics prevent rebuttal and cross-examination, which are the engines of the truth-finding process in an adversarial criminal trial. Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative. They certainly do not provide an important reason for us to cut back on a defendant's exercise of his Sixth Amendment rights.

Our holding does not jeopardize the state's opportunity to attack credibility. If a prosecutor's concern about the defendant's credibility is legitimate, she has readily available alternate means of questioning him. For example, she is free to cross-examine him about discrepancies between his pre-trial account of events and his testimonial account. Having introduced this evidence, she may then remark upon those discrepancies during her summation.¹³ She is also free, of

13. As mentioned above, however, we are not here stating that it is constitutional for a prosecutor to question the defendant during cross-examination about his unique ability to be present at trial, nor are we stating that she may avoid constitutional problems in summation by first raising the issue of fabrication or presence at trial during cross-examination. These factual circumstances are not before us. We only note that, if the defendant's credibility is truly the point which the state wants to raise with the jury,

course, to point out that he has motive to lie in order to escape incarceration (as Agard's prosecutor in fact did), and to remark upon that motive in summation (as she also did). Only those comments which specifically target and cast suspicion upon the defendant's unique Sixth Amendment right to be present at his trial and hear all testimony are forbidden by the Constitution; those remarks are not simple commentary upon credibility, nor are they necessary to a prosecutor's argument that the defendant lacks credibility, if that argument has a basis in fact and not only in innuendo.¹⁴

We therefore hold that the prosecutor's summation remarks violated Agard's Sixth Amendment right to confrontation.¹⁵

it is possible to raise that issue on both cross and summation without implicating constitutional rights.

14. The dissent asserts that this right is not "unique" because "[d]efendants are present in courtrooms all across the country every working day." The unique right of which we speak, however, is not some right unique to Agard himself, but rather the right to be present at trial, which is a right granted by the Constitution only to criminal defendants and to no other trial witnesses or parties.

15. Whether, as our dissenting colleague asserts, the jurors expect a defendant to be present in court by virtue of "plain common-sense, not the Sixth Amendment," is beside the point. Jurors may draw innumerable conclusions with regard to a defendant's presence, just as they may draw them with regard to a defendant's failure to testify, and there is nothing judges can do about it other than instruct them as to the applicable law. Cf. *Griffin*, 380 U.S. at 614, 85 S. Ct. at 1232-33. But the Supreme Court has stopped prosecutors from emphasizing the latter fact and implying some wrongdoing from the exercise of these constitutional rights, and we are able to do the same as to the former fact. And this we will do.

It is certainly true that defendants are present in courtroom every day. We hope it is not true that prosecutor's in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free to comment within our jurisdiction.

b. Right to Testify On One's Own Behalf

The Constitution provides a criminal defendant with an implicit right to testify in his own defense. United States v. Dunnigan, 507 U.S. 87, 96, 113 S. Ct. 1111, 1117, 122 L. Ed. 2d 445 (1993); Rock, 483 U.S. at 49, 107 S. Ct. at 2708. That right springs from the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor," U.S. Const. Amend. VI, and is also a "necessary corollary" of the Fifth Amendment's guarantee against compelled testimony.¹⁶ Rock, 483 U.S. at 51-53, 107 S. Ct. at 2708-10.

As noted in the discussion of the defendant's right to be present at trial, the Supreme Court has already held that commentary which chills the defendant's right to testify on his own behalf is unconstitutional. Griffin, 380 U.S. at 615, 85 S. Ct. at 1233. The remarks made by the prosecution here have a similar chilling effect upon the same right by forcing the

16. "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Although Agard has not relied upon the Fifth Amendment in his appeal to us, we raise the argument *qua sponte* in order to emphasize the entire framework of this right as set out in the Constitution.

The interrelationship enumerated rights is significant . . . The Bill cannot be construed merely taxonomically, as a set of pigeonholes or preconceived rules into which a given factual situation does or does not fit. Rather it must be viewed as a whole; it is an interlocking complex of basic principles of fairness and individual entitlement that carries a continuing meaning applicable to entirely different or changed circumstances.

James L. Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights, 54 N.Y.U. L. Rev. 911, 922 (1979).

defendant to choose between having his testimony viewed without unfair comment or exercising his constitutional rights to testify and to be present at trial. We therefore hold that these summation comments violate a defendant's right to testify on his own behalf and correspondingly the Fifth, Sixth and Fourteenth Amendments.

c. Right to Due Process of Law

In addition to providing a path for the Fifth and Sixth Amendments to attach to state prosecutions, the Fourteenth Amendment guarantees a state criminal defendant due process of law,¹⁷ including a fair trial. In determining whether prosecutorial misconduct during summation amounts to a violation of the Fourteenth Amendment, the Supreme Court has stated that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974)); Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991). See also, United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973) (racially biased summation remarks violated due process rights of defendant). We have previously held that "[w]e must examine the remarks in the context of the entire trial to determine whether the prosecutor's behavior amounted to prejudicial error. In determining whether there is prejudicial error we look at three factors: the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty

17. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. XIV.

of conviction absent the misconduct." Strouse v. Leonardo, 928 F.2d 548, 557 (2d Cir. 1991); see Bentley v. Scully, 41 F.3d 818, 824 (2d Cir. 1994), cert. denied, 116 S. Ct. 1029, 134 L. Ed. 2d 107 (1996).

In assessing whether Agard's right to due process has been violated, then, we first examine the severity of the prosecutor's misconduct. The State argues that the comments were "brief and isolated" and therefore not severe. See Bentley, 41 F.3d at 825. Yet, the length of the commentary is not automatically decisive. As the late Judge Frank once said, "[improper prosecutorial summation] remarks [have not been deemed] harmless because compressed into a single sentence, for experience teaches that a poisonous suggestion of that kind needs no elaboration." United States v. Antonelli Fireworks Co., 155 F.2d 631, 646 (2d Cir. 1946) (Frank, J. dissenting) (footnote omitted). A comment which directly disparages the defendant's exercise of constitutional rights can be severe misconduct regardless of its length. More important to due process analysis are the nature and effect of the remarks. Under other circumstances, a prosecutor's closing commentary upon a witness' opportunity to fabricate testimony might only implicate state evidentiary law; when the witness in question is the defendant, however, and the commentary goes to the heart of the constitutionally guaranteed rights to be present at trial and testify on one's own behalf, the very fairness of the entire trial is compromised.¹⁸

Moving on with the three-step analysis, we note that the trial court took no curative measures to correct the prosecutor's error (an unsurprising result, given that he did not find her

18. See discussion *infra* regarding Darden, 477 U.S. 168, 106 S. Ct. 2464.

comments to be erroneous). Though it is true that the judge instructed the jury that the lawyer's comments were not evidence and that the jury's recollections of events should control, see Charge at 827, this is a standard jury instruction and was not specifically directed at curing the error nor was it made at the time of the prosecutor's improper remarks.

Finally, we are not at all certain that Agard would have been convicted had the error not occurred. As we have already discussed, credibility was unquestionably the central issue at trial. The fact that the jury convicted only on anal sodomy and not on vaginal rape or oral sodomy indicates that it might have had trouble believing all of Winder's testimony; perhaps, without the prosecutor's summation comments, it would have believed Agard in the entirety. We cannot be certain. Our three-step test therefore indicates that the prosecutor's remarks, unchallenged by the trial judge, did deny Agard a fair trial.

Viewing these comments in the context of the entire trial, we also recognize that prosecutorial commentary which tramples upon a defendant's constitutional rights has been held to implicate the entire fairness of a trial more than non-constitutional error. When rejecting the defendant's due process claim in Darden, the Supreme Court stated that "the prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." Darden, 477 U.S. at 181-82, 106 S. Ct. at 2471-72 (emphasis added). In contrast, Agard's specific rights to testify on his own behalf, to compulsory process, and to confront the witnesses against him were all implicated by the comments we are reviewing. The entire fairness of his trial, and thereby due process, were likewise infringed. We therefore find that Agard's Fourteenth Amendment right to due process of law was violated

by the trial court's error.

2. Harmless Error Review

Having determined that the trial court committed error by permitting the prosecutor's improper summation in violation of Agard's constitutional rights, we now consider whether that error was so harmful as to warrant a grant of Agard's petition for habeas corpus.

a. Standard of Review

In evaluating an application for the writ of habeas corpus, we apply the standard of review enunciated in Brecht v. Abrahamson.¹⁹ In Brecht, the Court held that a conviction may be set aside on collateral habeas review only if the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1721-22, 123 L. Ed. 2d 353 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)).²⁰ If, however, "grave doubt" exists as to the

19. The Court has recently underlined the differentiation to which it alluded in Brecht and Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302 (1991) between "trial error" and "structural error." See California v. Roy, ___, U.S. ___, 117 S. Ct. 337, 338-39, 136 L. Ed. 2d 266 (1996). "Structural error" is that which is so tenuous as to evade harmless error review, Roy, 117 S. Ct. at 338, while "trial error" is that "which occurred during the presentation of the case to the jury." Fulminante, 499 U.S. at 307, 111 S. Ct. at 1264. The trial court's permitting of improper prosecutorial comments is "trial error" and thus is the proper subject of our review for harmless error.

20. Prior to Brecht, the standard of review for use by federal courts on collateral habeas review was that enunciated in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967), which held that a conviction tainted by constitutional error must be reversed unless the reviewing court could "declare a belief that [the trial

harmfulness of the error, it must be resolved in favor of the habeas petitioner. O'Neal v. McAninch, 513 U.S. 432, 437, 115 S. Ct. 992, 995-96, 130 L. Ed. 2d 947 (1995) ("By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." Id. at 435, 115 S. Ct. at 994.).

b. Application of Standard of Review

Upon evaluating the trial court's error under the Brecht/Kotteakos standard, we are certain that it was harmful. As noted in Part II.B., supra, credibility was the primary issue in Agard's trial, and was what the jury must have assessed most carefully. As to this particular issue, Agard's attorney reiterated on oral argument before the district court:

... the remarks that I am complaining about that the prosecutor made on summation relates (sic) again to the main issue in the case, which is credibility. We have the defendant testifying, which is not typical. And [the prosecutor] makes a big point out of saying to the jury: this is a big advantage this guy got; he got to sit here and listen to all of our witnesses and the luxury of then trying to figure out the best way to get around the damaging testimony they had. So it did implicate his constitutional rights.

error] was harmless beyond a reasonable doubt." Although we have recently commented that Chapman review may occasionally remain appropriate even upon collateral review, Lyons v. Johnson, 99 F.3d 499, 503 (2d Cir. 1996), that issue is not before us on appeal. Moreover, it is no more determinative of the matter at bar than it was in Lyons, because the trial court's error was harmful regardless of which standard is applied. We therefore proceed with Brecht/Kotteakos analysis.

But, again, on the question of prejudice, you know, anything that would cast any unfair suspicion on his credibility in this kind of case has to be considered harmful. . . . It is definitely related to the main theme of this case, which is: who should you believe?

District Court Transcript at 13-14. The prosecutor's improper summation comments directly and negatively affected Agard's credibility, and could single-handedly have been the reason for the jury's decision to believe, contrary to the available medical evidence, Winder's testimony that she was anally sodomized rather than Agard's denial that anal intercourse had taken place that weekend. We therefore find that the error meets the Brecht/Kotteakos standard of harmfulness in that it had a substantial and injurious effect on the jury's verdict.

Conclusion

The prosecutor's improper summation remarks violated numerous constitutional rights guaranteed to state criminal defendants, and were so prejudicial to Agard as to be considered harmful error. We therefore reverse the district court's denial of the writ of habeas corpus. The case is remanded to that court with directions to enter a revised judgment ordering Agard's release after he has served his sentence on the weapons possession conviction, unless the state affords him a new trial within sixty days from the issuance of our mandate. Our mandate shall issue forthwith.

VAN GRAAFEILAND, Circuit Judge, dissenting :

In February 1991, Ray Agard sat in a Queens County courtroom with a jury for ten days while the State of New York prosecuted him for a number of sex-related crimes. Nessa Winder and Breda Keegan were the complaining witnesses. A grand jury had indicted Agard on two counts with respect to Keegan's claims and fourteen counts with respect to Winder's. Three additional counts dealt with the unlawful possession of a revolver. After four days of deliberation, the jury acquitted Agard on both counts involving Keegan and on all the sex abuse counts involving Winder except a count of anal sodomy and a count of assault associated with one of the rape claims, which the trial court subsequently dismissed as repugnant to Agard's acquittal on the pertinent rape claim. The jury convicted Agard on two counts of unlawful possession, but one of the counts was dismissed by the court as duplicitous.

On the appeal of Agard's conviction, the Appellate Division, Second Department, stated that there was "overwhelming evidence of the defendant's guilt" and that the evidence "was legally sufficient to establish the defendant's guilt beyond a reasonable doubt." 199 A.D.2d 401, 402 (1993), leave to appeal denied, 83 N.Y.2d 868 (1994). The Court found "no merit" in the arguments that my colleagues herein advance. Frankly, I don't find any either.

Perhaps a good starting point for my expressions of disagreement with my colleagues is to restate the limited authority that a federal court has in reviewing a petition for habeas corpus relief based upon an asserted state court error. This is described in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), as follows:

The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow

one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941).

Id. at 642 (footnote omitted).

It is in the light of these words that we should view Griffin v. California, 380 U.S. 609 (1965), which my colleagues treat as a guiding star for the grant of relief herein. The case of United States v. Hasting, 461 U.S. 499, 508-09 (1983), sets forth the correct weight to be accorded Griffin:

Soon after Griffin, however, this Court decided Chapman v. California, which involved prosecutorial comment on the defendant's failure to testify in a trial that had been conducted in California before Griffin was decided. The question was whether a Griffin error was *per se* error requiring automatic reversal or whether the conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. In Chapman this Court affirmatively rejected a *per se* rule.

After examining the harmless-error rules of the 50 States along with the federal analog, 28 U.S.C. SS 2111, the Chapman Court stated:

"All of these rules, state or federal, serve a very

useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S., at 22 (emphasis added).

In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. Brown v. United States, 411 U.S. 223, 231-232 (1973), citing Bruton v. United States, 391 U.S. 123, 135 (1968); cf. Engle v. Isaac, 456 U.S. 107, 133-134 (1982). Chapman reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead 'impregnable citadels of technicality.'" R. Traynor, The Riddle of Harmless Error 14 (1970)(quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A.J. 217, 222 (1925)) (footnote omitted).

I suggest that the following two excerpts from my colleagues' opinions may very well qualify as "impregnable citadels of technicality."

So long as New York prohibits criminal

defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred.

Winter op. at 2.

It is certainly true that defendants are present in courtrooms every day. We hope it is not true that prosecutors in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free so to comment within our jurisdiction.

Oakes op. at 40 n.15.

The issue that should be determinative in every case is whether the petitioner had a fair trial. Malley v. Manson, 547 F.2d 25, 28 (2d Cir. 1976), cert. denied, 430 U.S. 918 (1977).

Although both judges and laymen agree that litigants are entitled to a fair trial, they are mistaken if they believe that the concept of fairness had its origin in the United States Constitution. Fairness was recognized as a matter of plain common sense long before the Constitution came into existence. The right of a defendant to be heard has been called one of the "first principles of the social compact and of the right administration of justice," McVeigh v. United States, 78 U.S. 259, 267 (1871), "a principle of natural justice, recognized as such by the common intelligence and conscience of all nations," Windsor v. McVeigh, 93 U.S. 274, 277 (1876). A Latin phrase, the English translation of which is "[h]e who determines any

matter without hearing both sides, though he may have decided right, has not done justice," is attributed to the Roman philosopher, Seneca, who lived some seventeen centuries before the Constitution was written.

A similar principle with "ancient roots" is the right of a defendant to be present in court to confront and cross-examine prosecution witnesses. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970). The defendant's presence "is fundamental to the basic legitimacy of the criminal process," United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983) (per curiam), and is required by the "dictates of humanity," Lewis v. United States, 146 U.S. 370, 372 (1892) (internal quotation marks omitted). Indeed, so strong is the defendant's right to be present that, for a time, the Supreme Court held that it could not be waived. See id. at 373-74; Hopt v. Utah, 110 U.S. 574, 579 (1884). The right to be present has been said to be "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455 (1912). "The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him." Snyder v. Massachusetts, 291 U.S. 97, 136-37 (1934) (Roberts, J., dissenting); see also Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

Today, in both the New York and the federal courts, a defendant not only has the right to be present throughout the trial, he has the duty to be present, subject only to certain limited exceptions. See Fed. R. Crim. P. 43; N.Y. Crim. Proc. L. SSSS 260.20 and 340.50; People v. Winship, 309 N.Y. 311, 313-14 (1955) (per curiam). Jurors are not blind fools, oblivious to the world around them. It is, I believe, safe to say that the jurors, who heard the prosecutor's comments concerning Agard's opportunity to hear the State's witnesses before he himself testified, had seen scores of trials portrayed in the movies and on television or had read about them; and almost

without exception, the defendant was present during each trial. If for no other reason, the defendant is required to be present so that he may be identified. What juror has not felt a tingle as he witnessed the dramatic spectacle of a prosecutor pointing to the defendant and asking the victim "Is this the man who ---?" Like all of us, jurors expect the defendant to be present in court, and, insofar as the lay jury is concerned, that expectation is based on plain common-sense, not the Sixth Amendment. Simply put, how could a defendant dispute the testimony of the prosecution's witnesses if he didn't know what they said?

I believe it is most unfair to the prosecutor in the instant case to hold that she "specifically target[ed] and cast suspicion upon the defendant's unique Sixth Amendment right to be present at his trial and hear all testimony." Oakes op. at 40. There was nothing "unique" about the defendant's presence, and I cannot agree that the prosecutor "cast suspicion" upon it. Defendants are present in courtrooms all across the country every working day. It was obvious to the jurors who sat through the ten-day trial that the defendant also was there and could hear the State's witnesses testify before he offered his own version of the events in question. In view of all of the foregoing, I search in vain for constitutional error in the prosecutor's statement concerning Agard's presence at trial.

My colleagues argue that the prosecutor's comment "invite[d] the jury to consider [Agard's] exercise of his right to confrontation as evidence of guilt, and therefore penalize[d] him for exercising that right." Oakes op. at 33. They say that this comment "impl[ied] that a truthful defendant would have stayed out of the courtroom before testifying." *Id.* The implication, in other words, is that a truthful defendant would have sequestered himself voluntarily, just as all other witnesses were involuntarily sequestered. The Supreme Court long ago provided the answer to this implication in Geders v. United States, 425 U.S. 80, 88

(1976):

But the petitioner was not simply a witness; he was also the defendant. A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.

My colleagues' assertion that jurors wouldn't recognize this distinction between defendants and witnesses again belittles the common sense of jurors. In attempting to measure the effect of the prosecutor's statement, I am unable to even visualize a juror rising to his feet in the jury room and saying, "If Agard is innocent, he would not have sat in the courtroom during the entire trial. He would have gone about his business and let his lawyer fend for himself."

As already observed, state appellate courts have a great deal more supervision and control over the conduct of their trial courts than do federal courts passing upon habeas corpus applications by state defendants. It is significant, therefore, that a number of state courts have found no violation of defendants' rights by comments similar to those of the prosecutor in the instant case. For example, in State v. Robinson, 384 A.2d 569,

570 (N.J. Super. Ct. App. Div.) (per curiam), cert. denied, 391 A.2d 498 (N.J. 1978), the prosecutor argued that the defendant "had the ability to sit here and listen to the other witnesses testify." The court rejected the defendant's claim of error with the following language.

We conclude that the prosecutor's comments did not in any way deprive defendant of his right to confront the witnesses against him or of his right to be present at his trial. Obviously he did confront these witnesses and was present at his trial. And a reasonable reading of the comments clearly reveals that they were a comment on the credibility of defendant's testimony. It is well settled that when a defendant waives his right to remain silent and takes the stand in his own defense, he thereby subjects himself to cross-examination as to the credibility of his story. And that issue would involve whether the story had been fabricated. State v. Kimbrough, 109 N.J. Super. 57, 67, 262 A.2d 232 (App. Div. 1970); State v. Burt, 107 N.J. Super. 390, 393, 258 A.2d 711 (App. Div. 1969), aff'd o.b. 59 N.J. 156, 279 A.2d 850 (1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 728, 30 L.Ed.2d 735 (1972). Here the issue of defendant's credibility was whether his testimony was tailored to that of the testimony of other witnesses, a perfectly proper inquiry.

The foregoing language was quoted verbatim in People v. Buckey, 378 N.W.2d 432, 438 (Mich. 1985), where the same result was reached.

In Reed v. State, 633 S.W.2d 663, 666 (Tex. Ct. App.

1982), the prosecutor told the jury: "And, you heard from the defendant. You heard the defendant's story. Of course, you got to hear the defendant's story after he had listened to everyone else testify—." The Court of Appeals said the "comment was a reasonable one, not manifestly improper and prejudicial, and did not deprive appellant of a fair trial." See also State v. Howard, 323 N.W.2d 872, 874 (S.D. 1982).

In United States v. Warren, 973 F.2d 1304 (6th Cir. 1992), trial below began on June 7, 1991. The Government made its opening statement on that day, but the defendant did not. The trial then was recessed until June 17 so that the judge could attend a judicial conference, and the recess continued for two more days because of illness of the judge's wife. In the prosecutor's closing argument to the jury, he said:

I gave my opening argument, tomorrow it will be two weeks ago. The truth hasn't changed since I gave you the original opening argument. The defendant waited to hear our witnesses before coming up with his version of the truth yesterday. But I submit to you I have proven the case against James Henry Warren that I told you I would prove two weeks ago.

Id. at 1307.

The Court of Appeals held there was no error, stating:

The argument of the prosecuting attorney is nothing more than fair comment on defendant's reservation of his opening statement and his allegedly concocted testimony that he had merely assisted John Williams in the pawning of Williams' pistol. This is the kind of thrust and parry customary in jury argument.

Id.

I must confess that I am baffled by some of my colleagues' arguments. Judge Oakes states, for example, that "[i]t is perfectly proper for a prosecutor to cross-examine a defendant about those portions of his testimony which have indicia of fabrication." Oakes op. at 38. I agree. He then continues, "[w]hen, however, a prosecutor raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens." I have read and reread the prosecutor's statements and I heard neither bells nor sirens. Judge Oakes goes on, "Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments." Id. at 38-39. If the lawyers were not litigating the facts relating to credibility during the course of the trial, I find it difficult to imagine what they were doing. To "fabricate" means to lie. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 811. The specter of fabrication pervaded the trial from its opening day. Winder testified that Agard committed anal sodomy on her; Agard said that he did not. One of them was not telling the truth. My colleague's statement, that the specter of fabrication was raised for the first time on summation and that there were no facts in evidence to support the inference of fabrication, is without basis in the record.

I am troubled by my colleagues' assertion that Agard had no chance to respond to the prosecutor's comments. "The normal function of rebuttal is to explain or rebut evidence offered by the adverse party." United States v. Neary, 733 F.2d 210, 220 (2d Cir. 1984). The Sixth Amendment protects a

defendant's right to confront witnesses, not lawyers. Moreover, judges in both the New York and the federal courts are vested with discretion to reopen a case after the defendant has rested. See People v. Harami, 93 A.D.2d 867, 868 (1983) (mem.); People v. Benham, 160 N.Y. 402, 437 (1899); United States v. Burger, 739 F.2d 805, 809-10 (2d Cir. 1984). If the prosecutor's statements were as improper and as harmful as my colleagues now contend, defense counsel should have requested the trial court for permission to put the defendant back on the witness stand. In view of the lack of merit in the claim of prejudicial error, I doubt that such a request would have been granted. The telling fact is that defense counsel did not make the request.

I am troubled also by Judge Oakes' casual treatment of the trial judge's "standard jury instruction" that comments by the lawyers are not evidence and that the jury's recollection of events should control. "A crucial assumption underlying [the system of trial by jury] is that juries will follow the instructions given them by the trial judge." Parker v. Randolph, 442 U.S. 62, 73 (1979) (quoted with approval in Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985)). "In the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions." Connecticut v. Johnson, 460 U.S. 73, 85 n.14 (1983) (quoting Chief Justice Traynor's monograph on harmless error, supra, at 73-74).

To repeat what I already have said, I believe it is absolutely essential for defendants to be present to hear the comments of the prosecution's witnesses so that they can respond to them and aid in their own defense. See United States v. Gregorio, 497 F.2d 1253, 1259 (4th Cir.), cert. denied, 419 U.S. 1024 (1974). Moreover, every juror with a modicum of common sense must realize that this is so. I find no error, therefore, in the prosecutor's comments about Agard's presence. "[C]onstitutional error occurs only when the prosecutorial

remarks were so prejudicial that they rendered the trial in question fundamentally unfair." Garofolo v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986). Forceful and vigorous argument by a prosecutor is not forbidden if based on the evidence. United States v. Brown, 456 F.2d 293, 295 (2d Cir.) (per curiam), cert. denied, 407 U.S. 910 (1972); United States v. Smith, 778 F.2d 925, 929 (2d Cir. 1985).

It would be a miscarriage of justice to call the state trial fundamentally unfair. My colleagues' discussions of possible inferences that a jury might draw are ingenious but not persuasive. Six state court judges and the district court below found no prejudicial error. Conviction on three counts out of nineteen after four days of deliberation is not very strong evidence of prejudice. Although we are not bound by the statement of the Appellate Division that proof of Agard's guilt was "overwhelming," cases such as Alston v. Redman, 34 F.3d 1237, 1242 (3d Cir. 1994), cert. denied, 115 S. Ct. 1122 (1995), and Tanner v. Vincent, 541 F.2d 932, 937 (2d Cir. 1976), cert. denied, 429 U.S. 1065 (1977), teach us that the following brief statement of facts in that court's opinion must be accorded substantial deference:

The complainant testified that on May 6, 1990, the defendant held a gun to her head, threatened to kill her, and beat her in the course of forcing her to have anal intercourse by "forcible compulsion." Later at the emergency room of a hospital, the victim was found to have bruises on her arms and legs, a cut lip, and a black eye so seriously battered that she had hemorrhages in it four to five weeks later, as well as floating spots up to the day of trial. In addition, the defendant admitted to owning a gun, which was recovered by the police.

199 A.D.2d at 402.

Miss Winder swore that she was sexually mistreated, and the indisputable facts clearly established that more than a simple amorous tete-a-tete had taken place. She said that she was threatened with a gun, and a gun was found in Agard's possession. Agard's abject apology found on Winder's answering machine the following day was not made without a compelling reason.

When this appeal was argued in our Court, two young women came in, listened to the argument and then left. Although I had no way of knowing who they were, their presence reminded me that, whatever the morals of the two female complainants, they also have rights that courts should recognize.

Winter, Circuit Judge, concurring in the result :

I concur in the result although on somewhat different grounds from those expressed in Judge Oakes's opinion.

With regard to the limitation on appellant's cross examination of Winder, appellant has not shown that any of the various answers that might have been given to the questions at issue would have enhanced his defense in any material respect. In particular, he laid no foundation to show that the questions might shed light on his arguments concerning the lack of physical evidence of trauma.

With regard to the limitation on the testimony of the

defense expert, the question seems close only because of hindsight. We now know of the unusual verdict rendered. In light of that verdict, the ambiguities regarding the use of the words "force" and "forcible" now seem obvious, and the limiting of the cross-examination was an event of considerable magnitude. But it is not error, much less constitutional error, to sustain objections to ambiguous questions.

With regard to the prosecutor's comments on summation, I agree with Judge Oakes that they implicated appellant's rights to be present at trial and to testify. I would, however, expressly limit our holding to the following circumstances.

First, the only evidence supporting the inference that appellant tailored his testimony to the prosecution's case was his presence in the courtroom and that testimony itself. There was, for example, nothing in the record indicating that appellant had earlier given a different version of events and altered that version after learning of the prosecution's evidence. The only support for the inference, therefore, was appellant's exercise of constitutional rights.

Second, the inference suggested by the prosecutor was entirely unfair in that appellant had no chance to anticipate and rebut it by testimony. Under New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements -- that is, evidence that he had told the same story even before witnessing the prosecution's case. See People v. McDaniel, 81 N.Y.2d 10, 16 (1993); People v. McClean, 69 N.Y.2d 426, 428 (1987). So long as New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not

fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred.

Third, the prosecutor's argument was not harmless. The case turned on detailed and conflicting versions of several events given by prosecution witnesses and by the defendant. The prosecution witnesses were present only for their individual testimony while the defendant was present for the entire trial.²¹ The accusation that appellant heard the prosecution's case and tailored his testimony to it was, therefore, a powerful argument. It affected none of the witnesses against him, and, as noted, was virtually impossible to rebut directly. The only effective way for appellant to have avoided this unfair but powerful argument would have been either to forego presence at the trial or testifying in his own defense -- important constitutional rights.

I therefore concur in the result.

21. We may assume for purposes of this matter that our dissenting colleague is correct in concluding that jurors generally expect a criminal defendant to be present in the courtroom during the trial and that remarking upon that presence merely states the obvious. However, the prosecutor's comments here went far beyond remarking upon Agard's presence. They specifically emphasized that other witnesses were not present to hear each others' testimony and that the defendant therefore had a "big advantage" in being able "to sit here and think what I am going to say and . . . [h]ow am I going to fit it into the evidence?" I doubt that many jurors are familiar with the practice of excluding witnesses except for their individual testimony. Indeed, courtroom scenes on television or in the movies may require the presence of the important characters for dramatic effect. In my view, therefore, the prosecutor's remarks explored matters far beyond the obvious and had a telling effect.

Agard v. Portuondo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1996

(Petition for Rehearing

Filed: July 18, 1997

Decided: October 23, 1998)

Docket No. 96-2281

ON PETITION FOR REHEARING BY THE PANEL

RAY AGARD,

Petitioner-Appellant.

- v. -

LEONARD PORTUONDO,

Superintendent of Fishkill Correctional Facility,

Respondent-Appellee.

Before:

WINTER, Chief Judge.

OAKES, and VAN GRAAFEILAND, Circuit Judges.

Petition for rehearing. In earlier opinions, a majority of the panel reversed the denial of a writ of habeas corpus, holding that Agard's constitutional rights were violated when the prosecution implied in closing argument that Agard, by virtue of being present in the courtroom throughout trial, gained the opportunity to fabricate his testimony. See Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997). We narrow the rationale of our ruling in that regard. We also reject appellee's claim, made for the first time in this petition, that Teague v. Lane, 489 U.S. 288 (1989), precludes our ruling. Otherwise, the petition for rehearing is denied.

Judge Van Graafeiland dissents in a separate opinion.

Ellen C. Abbot, Assistant District Attorney, Queens County, Kew Gardens, New York (Richard A. Brown, District Attorney, John M. Castellano, Assistant District Attorney, of counsel), for
Respondent-Appellee.

WINTER, Chief Judge:

This is a petition for rehearing challenging the granting of a writ of habeas corpus by the panel majority on the ground that, even if the majority's view of the law is correct, the decision created a "new rule" that cannot be retroactively applied to the petitioner. Teague v. Lane, 489 U.S. 288 (1989).

With respect to the merits, we narrow the rationale of, but do not alter, our prior decision. Upon further reflection, Judge Oakes and I now retreat from any language in our prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony. Although one factual element of such an argument may be the presence of the defendant during the trial, its principal focus is on a comparison of defendant's testimony with the testimony of other witnesses. Such an argument, unlike that made here, depends on what the defendant testified to regarding pertinent events, rather than focussing solely on his presence in the courtroom.

The prosecutor in the present case did something quite different, however, arguing that "unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . That gives you a big advantage, doesn't it." This was not a factual argument based on the defendant's testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony. The prosecutor's argument was not based on the fit between the testimony of the defendant and other witnesses. Rather, it was an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial. See State v. Cassidy, 672 A.2d 899, 908 & n.17 (Conn. 1996) (noting that such argument would not be

objectionable if supported by actual evidence of fabrication or tailoring); State v. Hemingway, 528 A.2d 746, 748 (Vt. 1987) (holding that presenting such argument in conclusory form without evidentiary support was constitutional error). Thus, the constitutional issue here is somewhat similar to that in Griffin v. California, 380 U.S. 609, 613-15 (1965) (disallowing generic argument based on a defendant's exercise of his Fifth Amendment right not to incriminate himself).

Appellee's petition argues, for the first time, that the majority's opinions created a "new rule" that, under Teague v. Lane, 489 U.S. 288 (1989), cannot be retroactively applied. In this circumstance, where the Teague issue was not raised in the district court and raised for the first time in the court of appeals only in the petition for rehearing, we believe that a panel has the discretion not to consider the issue. Teague is not jurisdictional in the sense that a court must invoke it *sua sponte* where applicable. See Caspari v. Bohlen, 510 U.S. 383, 389 (1994); Ciak v. United States, 59 F.3d 296, 302-03 (2d Cir. 1995) (court need not address Teague argument where government did not raise it in brief or at oral argument). Moreover, the Supreme Court has declined to apply Teague where it was argued for the first time in a case only after certiorari was granted. See Schiro v. Farley, 510 U.S. 222, 228-29 (1994). Teague itself is driven in part by considerations of comity. But comity also calls for representatives of states not to agree to federal courts expending substantial time in addressing the merits of a case, only to argue belatedly that the merits should not have been reached.²²

1. Appellee claims that the belated raising of Teague was the result of the difficulty in anticipating the panel majority's decision. However, the issue was raised in explicit terms by Agard. The index to his main brief states that "CERTAIN REMARKS BY THE PROSECUTOR ON SUMMATION . . . INFRINGED UPON HIS

We therefore agree with the Ninth Circuit's holding that Teague issues may, but need not, be addressed when raised only in a petition for rehearing. See Boardman v. Estelle, 957 F.2d 1523, 1534-37 (9th Cir. 1992) (per curiam supplementing opinion) (holding that Teague argument raised for first time in petition for rehearing is considered at discretion of court even though comity interest may be implicated); see also Schiro, 510 U.S. at 228-229 (holding that state can waive Teague argument by failing to make argument in timely fashion); Sinistaj v. Burt, 66 F.3d 804, 805 n.1 (6th Cir. 1995) (respondent waived Teague argument by raising it for first time in motion to amend district court's judgment); Wilmer v. Johnson, 30 F.3d 451, 454-55 (3d Cir. 1994) (respondent waived Teague argument by raising it for first time on appeal in supplemental brief requested by court). And, in this instance, we chose to exercise this discretion. See, e.g., Blankenship v. Johnson, 118 F.3d 312, 316-17 (5th Cir. 1997) (exercising its discretion not to consider a Teague argument); Eaglin v. Welborn, 57 F.3d 496, 499 (7th Cir. 1995) (in banc) (exercising same); Wilmer, 30 F.3d at 455 (same).

We specifically do not address, however, whether other habeas petitioners can take advantage retroactively of a "new rule" when, as here, the panel establishing that rule has exercised its discretion not to entertain a belated Teague claim. We also need not address whether our now-narrowed decision constitutes a "new rule" within the meaning of Teague.

CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL" and the text repeated that claim, stating that the remarks in question, *inter alia*, "unfairly assailed" his credibility and "concomitantly bolstered" that of the complainant. In light of this, we see no excuse for not arguing Teague, if indeed our adoption of those arguments created a new rule.

We therefore deny the petition.

VAN GRAAFEILAND, Circuit Judge, dissenting:

The original majority opinion herein is reported at 117 F.3d 696. My colleagues now submit a revised opinion, two pages of which deal with the issues discussed in the original opinion. I adhere firmly to my original dissent, reported in 117 F.3d at 716-21, but add this brief response to the arguments that my colleagues now advance.

At the outset, I disagree with the statement in my colleagues' revised opinion that the prosecutor's reference to the defendant's presence in court throughout the trial "was not a factual argument based on the testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." In making this argument, the prosecutor was not disinterestedly discussing "a" defendant. She was challenging the testimony given by "the" defendant in the instant case. She concluded her remarks concerning his testimony when she said:

He's a smart man. I never said he was stupid ...
He used everything to his advantage.

The issue in the case was credibility, and conscientious counsel could not avoid discussing it in their summations. For example, Agard's counsel argued to the jury that the prosecution witnesses had fabricated the allegations against Agard and that his testimony was more credible than theirs. See 117 F.3d at 706 n.3. The prosecutor's statements in response were not irrelevantly generic in nature. They were addressed squarely to Agard and his counsel's open-the-door, invite-a-response argument of "fabrication." They did not prejudicially violate Agard's constitutional rights. See United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998); United States v. Praetorius, 622 F.2d 1054, 1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); People v. Anthony, 24 N.Y.2d 696, 703-04 (1969).

Unlike my colleagues, I find little similarity between the instant case and Griffin v. California, 380 U.S. 609 (1965), which forbids comments about a defendant's failure to testify. The Griffin Court, citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), described such a comment as "a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws." 380 U.S. 609, 614. The Court continued, "It is a penalty imposed by courts for exercising a constitutional privilege." Id. However, unlike the defendant in Griffin, Agard's presence in the courtroom was not simply the exercise of a constitutional privilege -- it was compliance with a duty that "is one of the earliest established in the criminal law," i.e., the duty of a defendant to be present for trial. See Kivette v. United States, 230 F.2d 749, 755 (5th Cir. 1956), cert. denied, 355 U.S. 935 (1958). In short, while a defendant has the right to be present during his trial, he has no right to be absent. This is the rule in both the New York and federal courts.

Sections 260.20 and 340.50 of New York's Criminal

Procedure Law provide, with certain exceptions not applicable here, that a defendant must be personally present during the trial of an indictment. The New York courts have recognized these provisions as expressions of a "strong social policy in favor of requiring the presence of the defendant," People v. Anderson, 16 N.Y.2d 282, 288 (1965), and have held that "[a] defendant must obtain the permission of the Trial Judge to be absent from a trial," People v. Winship, 309 N.Y. 311, 314 (1955). In the early case of People v. Gardner, 144 N.Y. 119, 127 (1894), the Court said that the defendant "was bound to be in court and in the presence of the jury, the recorder and the witnesses who might be there. The recorder, the jurors and the witnesses had the right to see him, and he had the right to see them." See also People ex rel Lupo v. Fay, 13 N.Y.2d 253, 257 (1963) (defendant's presence is indispensable); People v. Rheubottom, 131 A.D.2d 790 (1987) (mem.) leave to appeal denied, 70 N.Y.2d 716 (1987) (no error in denying defendant's motion to remain outside courtroom); People v. Masselli, 134 Misc.2d 414, 415 (N.Y. Sup. Ct. 1987) (absent effective waiver, defendant's presence at felony trial is indispensable).

Although state, rather than federal law is at issue herein, Fed. R. Crim. P. 43, is very similar to the above-quoted provisions of New York's Criminal Procedure Law and is interpreted in much the same manner. See In re United States, 784 F.2d 1062, 1063 (11th Cir. 1986); United States v. Cannatella, 597 F.2d 27 (2d Cir. 1979) (per curiam); United States v. Moore, 466 F.2d 547, 548 (3d Cir. 1972) (per curiam), cert. denied, 409 U.S. 1111 (1973); United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1970).

Where, as here, a defendant is required by law to be present in court while all the witnesses testify, I can discern no prejudicial constitutional error in a prosecutor's reference to the

so-called "benefits" inherent in such requirement. Such "benefits," which are not of the defendant's doing, must be obvious to every juror with a modicum of common sense. The comment in question herein deals with the issue of a defendant allegedly coloring his testimony to conform with what has gone before. As former Justice Brennan said when discussing this issue in Brooks v. Tennessee, 406 U.S. 605, 611 (1972), "our adversary system reposes judgment of the credibility of all witnesses in the jury." Nothing that the prosecutor said in the instant case concerning Agard's obvious presence in the courtroom prevented the jury from properly exercising this judgment.

With all due respect to my learned colleagues, I must adhere to my dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
RAY AGARD,

Petitioner,

JUDGMENT

95-CV-2239 (RR)

-against-

LEONARD PORTUNDO, Superintendent,
Fishkill Correctional Facility,

Respondent.
-----x

An order of Honorable Reena Raggi, United States District Judge, having been filed on March 20, 1996, for the reasons stated at oral argument on March 15, 1996, denying the petition for a writ of habeas corpus and granting a certificate of probable cause to appeal, it is

ORDERED and ADJUDGED that petition take nothing of respondent; that the petition for a writ of habeas corpus is denied; and, that a certificate of probable cause to appeal is

80a

granted.

Dated: Brooklyn, New York

March 21, 1996

ROBERT C. HEINEMANN

Clerk of Court